Supreme Court, U.S.
FILED
FEB 5 1985
ALEXANDER L. STEVAS
CLERK

84-1442

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

No. _____

AUGUST S. CARSTENS, FRIENDS OF THE EARTH, Petitioners,

v.

NUCLEAR REGULATORY COMMISSION, THE UNITED STATES OF AMERICA, Respondents,

SOUTHERN CALIFORNIA EDISON COMPANY, ET. AL., Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WALTER W. HEISER
RICHARD J. WHARTON
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
ENVIRONMENTAL LAW CLINIC
Alcala Park
San Diego, CA 92110
(619) 260-4600 Ext. 4495
Counsel for Petitioners

104 pp

QUESTIONS PRESENTED

1. Whether the opinion of the Court of Appeals conflicts with previous U.S. Supreme Court and D.C. Circuit cases regarding the standard of review to be used in reviewing the administrative decisions of Federal agencies in that the Court's opinion gives excessive deference to the determinations of law and fact made by the Nuclear Regulatory Commission under circumstances in which the case involved great scientific uncertainty and it is uncontested that the decision-makers had no expertise whatsoever regarding the sciences and technologies in controversy, namely seismology and geology?

2. Whether this decision so limits judicial review in federal administrative agency cases as to make any such review futile and superfluous thereby denying the petitioners and future litigants so situated the right to full access to the

courts for redress of grievances.

3. Whether the Court of Appeals properly considered and determined whether the decision by the NRC was based on a consideration of all relevant factors and whether the NRC considered and decided all issues required to be considered and decided by 10 CFR Part 100 App. A?

4. Whether the D.C. Circuit Court of Appeals failed in its duty under 5 USCS Sec. 706 to supervise the functions of the Nuclear Regulatory Commission by summarily dismissing petitioners' allegations that the NRC, in the conduct of its proceedings, has taken steps and used methods that are alien to basic principles of due process and fair proceedings?

5. Whether the Appeals Court, misapprehended numerous important issues of law or fact, and/or failed to decide certain important issues raised on appeal so that it is necessary and appropriate to remand the case for reconsideration?

INDEX

Page

Opinion below.....3
Jurisdiction.....4
Statutory provisions involved.....4
Questions presented.....5
Statement of the case.....8
A. Course of Proceedings Below
1. Construction license proceeding.....8
2. Operating License proceeding.....10
3. Subsequent proceedings.....16
B. Statement of facts upon which error at the administrative level is based.....18
Reasons for granting the writ.....28
A. Summary of argument for granting the writ.....28
B. The decision in this case is in conflict with previous decisions of the Supreme Court and the D.C. Court of Appeals Regarding the appropriate standard of review of federal administrative agency decisions.....32
C. The inadequacy of the Court's review is compounded by its misapprehension of numerous issues of law and fact and its failure to adequately address or decide certain key issues....45
Conclusion.....64
Certificate of Service.....
Affidavit of Filing.....
Appendix (Opinion and Judgment of Court of Appeals; Statutes and Regulations; Commission policy on hearing management).....App p.1
(separate volume)
Supplemental Appendix.....

CITATIONS

CASES:

Baltimore Gas & Electric Co. v. N.R.D.C.,-- U.S. --, 103 S. Ct. 2246 (1983).....33, 45, 46

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).....33, 34, 35

Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).....33, 43, 46

Ethyl Corp. v. E.P.A., 541 F.2d 1 (D.C. Cir. 1976) cert. denied, 426 U.S. 941 (1976).....33, 41

Greater Boston Television Corp. v. F.C.C., 444 F.2d 841 (D.C. Cir. 1970) cert. denied, 403 U.S. 923 (1971).....33, 37, 38

International Harvester v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).....33, 44, 55

Nat'l Ass'n of Farmworkers v. Marshall, 628 F.2d 604 (D.C. Cir. 1980).....47

Office of Communication of United Church of Christ v. F.C.C., 425 F2d 543 (D.C. Cir. 1969).....18

ADMINISTRATIVE ORDERS AND DECISIONS

In the Matter of Southern California Edison Co., 2 AEC 366 (1964).....8

Southern California Edison Company, et al.(San Onofre Nuclear Generating Station, Units 2 and 3) LBP-73-76, 6 AEC 929 (1973).....3,8,9,24,51

Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) LBP-82-3, 15 NRC 61 (1981).....3,15,22,23,25

Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) ALAB 673, 15 NRC 688 (1982).....3,17,23
Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) CLI-82-11, 15 NRC 1383 (1982).....3
Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) ALAB 717, 17 NRC 346 (1983).....3,17,25
Revised Prehearing Conference Order, dated May 5, 1981.....13
Commission Policy Statement on Hearing Management, dated May 22, 1981.....12
Addendum to Order of June 3, 1981 (Re Answers to Interrogatories from Intervenors FOE (June 5, 1981).....13

Statutes

Federal Administrative Procedure Act
Appendix
5 U.S.C. Sec. 554.....30
5 U.S.C. Sec. 556(a)(d).....31
5 U.S.C. Sec. 557(c).....34
5 U.S.C. Sec. 706(2)(f).....7

Federal Harmless Error Statute
28 U.S.C. Sec. 2111.....35

Regulations

10 CFR Sec. 2.732.....36
10 CFR Sec. 2.740.....36
10 CFR Sec. 2.743.....63
10 CFR Sec. 2.751(a)(d).....61,62
10 CFR Sec. 2.752.....39
10 CFR Sec. 2.754(a).....39
10 CFR Sec. 2.754(c).....40
10 CFR Sec. 2.780.....7,49
10 CFR Sec. 2.787.....7
10 CFR, Pt. 100, App. A, Para. I.....7

10 CFR, Pt. 100, App. A, Para. II.....7
10 CFR, Pt. 100, App. A, Para.
III(a),(c),(g).....7
10 CFR, Pt. 100, App. A, Para. IV
10 CFR, Pt. 100, App. A, Para.
V(a),(i),(iv).....7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

No. _____

AUGUST S. CARSTENS, FRIENDS OF THE EARTH, Petitioners,

v.

NUCLEAR REGULATORY COMMISSION, THE UNITED STATES OF AMERICA, Respondents,

SOUTHERN CALIFORNIA EDISON COMPANY, ET AL., Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, AUGUST S. CARSTENS, FRIENDS OF THE EARTH, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 7, 1984. (Docket #83-1879).

The three judge panel consisted of

Judges Bork, Scalia and Starr with Judge Starr writing the opinion. The opinion affirmed the granting of an operating license to the applicant SOUTHERN CALIFORNIA EDISON (SCE) by the Nuclear Regulatory Commission (NRC) for the operation of two large nuclear power plants located approximately half-way between Los Angeles and San Diego in a seismically active region on the Pacific Coast. The main issue before the Nuclear Regulatory Commission was whether there is reasonable assurance that the plants were designed to withstand the largest earthquake which could occur during the operating life of the plant. The NRC Contended that it was "appropriately conservative" to design and build the plants to withstand a maximum magnitude earthquake registering M_s=7 on the Richter scale generating peak ground acceleration of .67 of the force of gravity.

Petitioners contend that the faults located within four miles of the plant were capable of producing earthquakes and resulting ground motion larger than the plants were designed to safely withstand.

OPINION BELOW

The opinion of the Court of Appeals, 742 F.2d 1546, appears in the Appendix hereto. (See Appendix p. ___). The administrative decisions of the Nuclear Regulatory Commission subject to review by the Court of Appeals are as follows:

Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) LBP-82-3, 15 NRC 61 (1981). Supplemental Appendix p. 46.

Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) ALAB 673, 15 NRC 688 (1982). Supplemental Appendix p. 188.

Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) CLI-82-11, 15 NRC 1383 (1982). Supplemental Appendix p. 211.

Southern California Edison Company, et al. (San Onofre Nuclear Generating Station, Units 2 and 3) ALAB 717, 17 NRC 346 (1983). Supplemental Appendix p. 214.

Because these decisions are so voluminous, they are contained in a separate volume identified as "Supplemental Appendix" (hereinafter referred to as Supp. App.)

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 7, 1984. A timely petition for rehearing en banc was denied on November 7, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES, ORDINANCES AND REGULATIONS

The case involves the following statutes, ordinances and regulations, copies of which are attached hereto in the Appendix.

Statutes

Federal Administrative Procedure Act

Supp. App. page:

5 U.S.C. Sec. 554.....30
5 U.S.C. Sec. 556(a)(d).....31
5 U.S.C. Sec. 557(c).....33
5 U.S.C. Sec. 706(2)(f).....34

Federal Harmless Error Statute
28 U.S.C. Sec. 2111.....35

Regulations

10 CFR Sec. 2.731.....36
10 CFR Sec. 2.732.....36
10 CFR Sec. 2.740.....36
10 CFR Sec. 2.751.....38
10 CFR Sec. 2.752.....38
10 CFR Sec. 2.753.....38
10 CFR Sec. 2.754(a).....39
10 CFR Sec. 2.754(c).....39
10 CFR Sec. 2.787.....40
10 CFR, Pt. 100, App. A, Para. I.....41
10 CFR, Pt. 100, App. A, Para. II.....41
10 CFR, Pt. 100, App. A, Para. III.....42
10 CFR, Pt. 100, App. A, Para. IV.....43
10 CFR, Pt. 100, App. A, Para. V(a),(i),(iv).....45

QUESTIONS PRESENTED

1. Whether the opinion of the Court of Appeals conflicts with previous U.S. Supreme Court and D.C. Circuit cases regarding the standard of review to be used in reviewing the administrative decisions of Federal agencies in that the Court's opinion gives excessive deference to the determinations of law and fact made by the Nuclear Regulatory Commission under circumstances in which the case involved great scientific uncertainty and it is

uncontested that the decision-makers had no expertise whatsoever regarding the sciences and technologies in controversy, namely seismology and geology?[1]

2. Whether this decision so limits judicial review in federal administrative agency cases as to make any such review futile and superfluous thereby denying the petitioners and future litigants so situated the right to full access to the courts for redress of grievances.

3. Whether the Court of Appeals properly considered and determined whether

---

1/ None of the ASLB judges have any expertise whatsoever in Seismology or Geology. The Chairman, Mr. James Kelley, is an attorney who has worked most of his career for the NRC. The other members were Mrs. Elizabeth Johnson, a physicist from the Oak Ridge National Laboratory, and Dr. Cadet Hand, a marine biologist. Transcript p. 678, J.A. p. 6. This total lack of knowledge of the subject matter is emphasized by the Board requesting a basic tutorial. As stated by the Chairman, "Well the Board frankly in our self-interest could become better educated, so that we would have a better understanding of the testimony and the record as it develops, and counsel for the Applicants suggested

the decision by the NRC was based on a consideration of all relevant factors and whether the NRC considered and decided all issues required to be considered and decided by 10 CFR Part 100 App. A?

4. Whether the D.C. Circuit Court of Appeals failed in its duty under 5 USCS Sec. 706 to supervise the functions of the Nuclear Regulatory Commission by summarily dismissing petitioners' allegations that the NRC, in the conduct of its proceedings, has taken steps and used methods that are alien to basic principles of due process and fair proceedings?

5. Whether the Appeals Court, misapprehended numerous important issues of law or fact, and/or failed to decide

1/ (cont.)
that they would be willing to give a presentation of I don't know how to characterize it, the elementary seismology". Transcript pp. 1153, 1154, J.A. pp. 46-47. The Board then received a basic instruction on elementary seismology given by SCE, with heavy emphasis on what the Applicants wanted to prove. Transcript pp. 1155-1250.

certain important issues raised on appeal so that it is necessary and appropriate to remand the case for reconsideration?

STATEMENT OF THE CASE

A. Course of Proceedings Below

1. Construction License Proceeding

In 19.3, Units 2 and 3 of San Onofre Nuclear Generating Station were authorized for construction by the then Atomic Energy Commission. Southern California Edison Co. (San Onofre Nuclear Generating Station Units 2 and 3), 6 AEC 929 (1973)(See Supp. App. p. 1; Joint Appendix p. 440./2 (hereinafter referred to as J.A.) Some seismic design issues were contested at that time but by different Intervenors than

2/ The Joint Appendix is the three volume appendix submitted to the Court of Appeals for the D.C. Circuit. It is not submitted with this petition because of its volume but petitioners will make the Joint Appendix available if the Court deems it necessary.

in the present case./3 The sole seismic safety issue in contention in the Construction License proceeding was whether ".67g was a reasonably conservative design basis earthquake". Id. at 931; Supp. App. p. 3. The NRC Licensing Board decided that it was. 6 AEC 929, 938 (1973).

In reaching this decision the Licensing Board made specific findings regarding the nature and length of that geologic feature known as the Offshore Zone of Deformation (OZD). 6 AEC 929, 942 (1973). (See Supp. App. p. 14).

Also of relevance to the present proceeding is the fact that the Licensing Board at the construction hearing did not

---

3/ In the construction licensing proceedings the Intervenors were: American Association of University Women, Groups United Against Radiation Danger and Scenic Shoreline Preservation Conference Incorporated 6 AEC 929, 930 #8 (See Supp. App. p. 2). None of these parties participated in the present proceeding regarding the seismic design issues. (See Supp. App. p. 56).

hear evidence nor did it make any findings regarding whether the Cristianitos Fault, which is within one mile of the plant site, was a capable, or active fault. The issue was not raised by the Intervenors at that proceeding; it was not in issue at that proceeding, and it was not decided. 6 AEC 929, 931 (1973). (See Supp. App. p. 3).

2. Operating License Proceeding

In March, 1977, the Utilities filed an application for an operating license for SONGS 2 & 3. On October 26, 1977, a group led by Mr. August Carstens was admitted as a party to participate as Intervenors in the proceedings. J.A. p. 545.

On January 27, 1978, the Atomic Safety and Licensing Board (ASLB) allowed Intervenors' contentions on a variety of subjects, but rejected most of them.\[4]

4/ Prehearing Conference Order dated Jan. 27, 1978 contained in Index to Record as Volume 42 Document No. 33.

The contention relevant to this action allowed by the Board was:

> "The seismic design basis for SONGS 2 & 3 is inadequate to protect the public health and safety and does not comply with 10 CFR, Pt. 100, App. A, in that the earthquake which could cause the maximum vibratory ground motion has not been assigned as the safe shutdown earthquake".
>
> (Prehearing Conference Order Jan. 27, 1978 p.2)

On August 27, 1980, the ASLB issued an order establishing a discovery timetable. Intervenors filed extensive interrogatories pursuant to the timetable. In response, applicants and NRC staff objected to and refused to answer many of the questions. Intervenors were forced to bring motions to compel.

Prior to discovery being complete and prior to the ASLB ruling on Petitioners' motion to compel, the ASLB ordered a final-prehearing conference to be held on April 29, 1981. At that hearing, the

Licensing Board made clear its intent to comply with a soon to be issued directive from the NRC to speed up the operating license process and to expedite the hearing process.\5

The directive anticipated by the Licensing Board was formally issued by the NRC on May 20, 1981.\6 This directive from the NRC to the Hearing Boards noted that because of the Three Mile Island accident, and the subsequent diversion of NRC staff time and resources,"some operating license hearings may not be completed before construction is complete." San Onofre was the most evident of these since the hearing schedule was being discussed at the time the order was issued. It directed adjudicatory boards "to expedite the

---

5/ See, J.A. p. 517 wherein the Board notes the concern of the NRC regarding delay of proceedings.

6/ See," Statement of Policy on Conduct of Licensing Proceedings" [CLI-81-8] Federal Register Vol. 46 No. 101 (See Appendix p. 48).

hearing process".(See, Appendix p. 49).

The Licensing Board issued its final prehearing conference order on May 8, 1981 and ordered Intervenors to file all of their written testimony by June 5,1981./7 The Board did not formally rule on Petitioners' motions to compel answers until May 13, 1981 and ordered the answers served on Intervenors by May 21, 1981./8 Discovery was not complete on the seismic issue until May 21, 1981. On May 28, 1981/9, the Licensing Board revised its order to allow Intervenors until June 12, 1981, to file all of their written testimony and ordered Hearings to commence

7/ Licensing Board Final Prehearing Conference Order dated May 8, 1981 contained in Index of Record as Volume 45 Document No. 3.

8/ Licensing Board Order (Rulings on Motions to Compel Answers to Interrogatories dated May 13, 1981. (Index of Record Volume 45 Document No. 5.)

9/ Licensing Board Revised Prehearing Conference Order (Index of Record Vol. 45 Doc. 33; J.A. p. 514, 521.

on June 22, 1981.[10] The Intervenors Carstens, et al., met all of these onerous deadlines but at great cost to their ability to prepare the written testimony of volunteer witnesses and to their ability to prepare for cross-examination.[11] The Board's order of May 8, 1981 also rejected all of Intervenors' proposed contentions and admitted four contentions proposed by the Applicants "subject to the possibility of expansion upon appropriate further

---

10/ The record in this case shows that the Applicants served the voluminous written testimony of 11 expert witnesses covering 17 different areas on Intervenors on June 12, 1981. The Applicants put on their case first so that Intervenors had only 9 days after receipt to prepare for cross-examination of the expert witnesses of the Applicants.

11/ Intervenors sole attorney (a full-time professor of law at the University of San Diego), because of the accelerated hearing schedules and numerous motions, simply did not have time to prepare for cross-examination of the early witnesses.(See, transcript of hearing pages 729; 803-881; 1058-1108; 1292).

showings by the Intervenors". 15 NRC 61, 72, 73.[12] (See Supp. app. p. 58). The hearings began on June 22, 1981, in San Diego, California and, after two short recesses, concluded on August 4, 1981. The Atomic Safety and Licensing Board issued its Partial Initial Decision (PID) on January 11, 1982. 15 NRC 61 (1982); Supp. App. p. 46. The PID authorized the issuance of an operating license based upon the Licensing Board's finding that, "there is reasonable assurance that San Onofre Units 2 and 3 can be operated without endangering the health and safety of the public". 15 NRC 61, 184, 185; Supp. App. p. 169, 170.

12/ The contentions admitted for hearing were:(1) Whether as the result of ground motion analysis techniques developed subsequent to issuance of the construction permit or data gathered from earthquakes which occurred subsequent to issuance of the construction permit, the seismic design basis for SONGS 2 & 3 is inadequate to protect the public health and safety; (2) Whether characterization of certain offshore geologic features as a zone of deformation, referred to as the Cristianitos Zone of Deformation (CZD), or

3. Subsequent Proceedings

Intervenors, Carstens and Friends of the Earth, filed Exceptions to the Partial Initial Decision on January 7, 1982, and filed a petition for stay with the Atomic Safety and Licensing Appeals Board on January 27, 1982. On February 26, 1982 Intervenors Carstens, et al. filed a timely Brief in Support of Exceptions to the Partial Initial Decision.

12/ (cont.)
whether any additional information about the CZD which became available subsequent to issuance of the construction permit render the seismic design basis for SONGS 2 & 3 inadequate to protect the public health and safety. (3) Whether the seismic design basis for SONGS 2 & 3 is inadequate to protect the public health and safety as a result of discoveries subsequent to issuance of the construction permit of the following geologic features ... Such other features as the parties may agree are relevant to the seismology of the SONGS site or with respect to which Intervenor Friends of the Earth makes a threshold showing of relevance. (4) Whether based on the geologic and seismic characteristics of the OZD, including its length, assignment of M_s7 as the maximum magnitude earthquake for the OZD renders the seismic design basis for SONGS 2 & 3 inadequate to protect the public health and safety.

On April 26, the Atomic Safety and Licensing Appeals Board issued a decision denying Petitioners' request for stay of the decision regarding seismic risk. ALAB-673; 15 NRC 688; (See, Supp. App. p. 184).

On March 4, 1983, almost 13 months after Petitioners filed its appeal of the Partial Initial Decision, the Atomic Safety and Licensing Appeal Board issued its decision denying Petitioners' Appeal. ALAB-717, 17 NRC 346, J.A. p. 637. (See Supp. App. p. 214). On March 24, 1983, Petitioners filed a Petition for Review with the NRC pursuant to 10 CFR Sec. 2.786. On June 30, 1983, almost 17 months after the Appeal was filed, the Commission notified Intervenors that it had declined to review the petition for review and the decision became final on June 21, 1983.

On August 19, 1983, Petitioners filed a Petition for Review with the U.S. Court

of Appeals for the District of Columbia. The matter was argued on May 29, 1984 and the decision of the Court of Appeals was entered on September 7, 1984. (See Appendix p. 1). Petitioners filed a timely petition for rehearing en banc on October 22, 1984. The Court of Appeals denied the petition for rehearing en banc on November 7, 1984.

B. STATEMENT OF FACTS UPON WHICH ERROR AT THE ADMINISTRATIVE LEVEL IS BASED.

We request the court to review this statement of facts upon which error at the administrative level is based, in light of the decision written by, then, Judge Warren Burger of the D.C. Circuit court in the case of Office of Communication of United Church of Christ v. F.C.C., 425 F2d 543 (D.C. Cir. 1969). This is the leading case regarding the role of Public Intervenors, and the treatment such intervenors are to be accorded. The Court stated:

> "The record now before us leaves us with a profound

> concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair. We are compelled to hold, on the whole record that the Commissions' conclusion is not supported by substantial evidence. For this reason the granting of the license must be vacated forthwith." [emphasis added] U.C.C. v. F.C.C., supra at p. 550.

1. The Licensing Board did not give intervenors sufficient time to prepare their case for hearing.

As set forth above at pages 13 and 14 the Licensing Board gave the Intervenors only three weeks to review all discovery and prepare all of the voluminous written

testimony of volunteer expert witnesses, and only 10 days after that to organize and prepare the case for hearing. Intervenors had only one week to prepare for cross-examination of the applicants 11 expert witnesses who submitted voluminous testimony regarding 17 specific areas. J.A. p. 514 et seq.; 528 et seq; p. 539. The Intervernors had one attorney working on a pro bono basis and had to rely on unpaid volunteer expert witnesses. The Applicants had six full-time attorneys and numerous paid experts. The NRC staff assigned four attorneys to this case, and had a full staff of NRC experts. It was literally ten attorneys against one. (See Supp. App. p. 63 for appearances).

2. The Licensing Board improperly struck from the record the entire testimony of intervenors' expert witness Richard Simons who testified to a study he prepared regarding earthquake activity on the

Cristianitos Fault.

Richard Simons, a 1959 graduate of MIT with degrees in geology and geophysics and a highly experienced full-time seismic research specialist for Scripps Institute of Oceanography and Geoplanetary Physics prepared a study showing the location of all of the earthquakes which have occurred on or near the Cristianitos fault (which is less than 1 mile from the plant) since 1932 based on data obtained from the California Institute of Technology. He drew "error bars" or circles around each epicenter location. These error bars represented the margin of error contained in the data from Cal Tech as to the exact location of each earthquake. It revealed that 20 earthquakes have occurred since 1932 and 8 earthquakes have occurred since 1973 inside the error bars which encompass the Cristianitos fault. This apparently valuable evidence was stricken from the

record as having no probative value and because of the "lack of qualification of the witness" and his "demeanor". 15 NRC 61, 76; (See, Supp. App. p. 61, 62).

3. The Licensing Board improperly "foreclosed" the issue of whether the Cristianitos Fault is a capable fault and refused to decide the issue. This ruling was considered error by the Appeals Board, but the Appeals Board improperly ruled it to be "harmless error".

The Licensing Board would not allow the Cristianitos fault capability issue to be fully litigated and decided. It determined that since previous Intervenors, none of whom participated in this proceeding, did not litigate the issue in 1973, the present Intervenors were "foreclosed" from litigating the issue now. This, despite the evidence submitted that eight earthquakes may have occurred on this fault since 1973. It also "foreclosed" the

issue from being decided on the merits. (See Supp. App. p. 66); (15 NRC 61, 81, 82; This foreclosure of the issue from decision was ordered despite the Licensing Board finding in its decision that, "If the Cristianitos were shown to be a capable fault it would certainly be significant and perhaps crucial to the safety of the San Onofre facility." (See Supp. App. p. 63); 15 NRC 61, 78.

The Appeals Board found this ruling to be error but found that it was harmless error because it reviewed the stricken evidence and ruled, in effect, that the Intervenors would not have been able to prove that the Cristianitos is an active fault, even if they had been allowed to fully litigate the issue. (See Supp. App. p. 194; 15 NRC 688, 698).

4. The Licensing Board redecided an issue which had been previously decided at the construction hearing and which had been

stipulated to by the parties to this decision as not being subject to redecision.

The applicants and NRC staff were parties to the construction hearing in which it was definitively decided that the Offshore Zone of Deformation (OZD) was 240 km long and not segmented. 6 AEC 929 942 (1973) (See Supp. App. p. 14). It was also stipulated by all the parties in this proceeding that the OZD was continuous and not segmented. Trans. p. 1046, 1047, J.A. p. 1043-1054. The Intervenors prepared their case on the assumption that the OZD was continuous and not segmented. The Board, without giving notice to Intervenors that the issue was subject to redecision, decided that the OZD was not continuous but was segmented. 15 NRC 61, 106. (See Supp. App. p. 91).

5. The Licensing Board admitted into evidence for the truth of all of the matters contained therein, the Final Safety Analysis Report consisting of over 11,000 pages prepared by the applicants. The authors of the document were not identified and intervenors were not permitted to cross-examine any of the authors of the documents even though the authors actually testified at the hearing. Transcript pp. 709-712; 1010; J.A. p. 8-12; p. 24 ln. 9-15 for ruling. The Appeals Board found this to be error but ruled it was nonprejudicial error because "limited reliance" was placed on the document. 17 NRC 346, 368 (See Supp. App. p. 236).

6. The Licensing Board, the Appeals Board and the Appeals Court totally ignored the operative testimony of a key NRC staff witness, Dr. Slemmons, regarding the maximum magnitude earthquake that can occur

on the OZD. Dr. Slemmons on cross-examination retracted his written testimony and testified that the appropriately conservative estimate of the maximum magnitude earthquake on the OZD IS M_S=7.4-7.8. The Licensing Board, the Appeals Board and the Court of Appeals continue to rely on his retracted written testimony and ignore his definitive statement regarding the matter. (See, J.A. p. 376; 389-393).

7. The Board ignored and totally misconstrued the testimony of an independent witness from the United Stated Geological Survey. Dr. Boore testified that an M_S=7.0 earthquake on the OZD could likely generate ground acceleration far in excess of .67g. His testimony was improperly discounted. (See J.A. p. 406, 407, 415).

8. The NRC totally ignored the testimony of a truly independent witness. Dr. Luco, was the only witness to testify as a Licensing Board witness. His testimony clearly establishes that the plant is not designed to withstand the ground acceleration which are likely to occur at the plant from an M_S=6.5 or M_S=7.0 earthquake on the OZD. (See J.A. p. 335-342).

9. The Licensing Board and the Appeals Board have issued rulings based upon their determination that the methods used to determine the safe shutdown earthquake were "conservative" and that the determination of the safe shutdown earthquake is "appropriately conservative" to protect the public health and safety. The term "conservative" is used over 30 times in these rulings but it is never defined and is used in a totally arbitrary manner. (Cites are too

numerous to list but are available upon request.)

REASONS FOR GRANTING THE WRIT

A. SUMMARY OF ARGUMENT FOR GRANTING THE WRIT.

Petitioners respectfully submit that the decision in this case sets a precedent that will result in depriving citizens of the fundamental right to redress grievances before the courts of the land and opens wide the door for the federal bureaucrats to institute an unchecked reign of technocracy. Under this ruling, all that need be shown for an agency to avoid close judicial scrutiny is that the subject in controversy involves uncertainty in science and technology. This is a very dangerous precedent.

Petitioners further submit that in cases in which the decision directly affects the health, safety, and, the very lives of millions of people, and where the

bureaucrats actually making such decisions have no expertise in the subject matter decided, the court's review of such actions must be at its most stringent. Certainly, the court should give deference to certain findings of fact traditionally considered to be solely in the province of the fact finder. However, it should carefully review the conduct of the proceedings; the findings made, the criteria used in making the decision, and the reasons and motives for choosing among the uncertainties.

The judicial branch of government, does not, and cannot, possess expertise in all areas of technology. Nevertheless, it must not be allowed to abdicate its constitutional duty to protect the American people from abuse of power by the federal government by allowing the technocrats of the various federal agencies to go unbridled. The rule of law, must continue to prevail in our ever increasing

technological age. The Court cannot simply throw up its hands and say in effect, "I don't understand this, therefore I will defer to the agency." When confronted with such a situation the Courts must more closely scrutinize the matter in order to compensate for their own lack of technical expertise. This is especially true when the administrative board which made the decision had no expertise. Under such circumstances, the Court must re-double its efforts to assure that such proceedings are absolutely fair. It should see to it "that all relevant factors were fully considered" and that the reasons for the choices made are fully and reasonably explained with a full disclosure of all of the uncertainties and the inherent risks in those uncertainties. It should require that agency decision provide a reasonable and comprehensible explanation of why the

uncertainties were resolved in a certain way.

The NRC proceedings in this case is replete with procedural irregularities and basic unfairness. Its various decisions use words that have no meaning, and contain glaring errors of law and fact. But the Appeals Court simply ignored these errors and deferred almost blindly to the NRC because the case involved uncertainty in science and technology. In so doing it failed to fulfill its obligation to supervise the functions of a federal agency, the decisions of which, directly affect the health and safety of millions of people.

Further, the Court's misapprehension of issues of law and fact and its failure to decide crucial issues serves to underscore the Court's failure to adequately deal with the complexities of the scientific evidence in this case. It

simply decided to abdicate its responsibility to an administrative agency. In so doing it established a standard of review which, if followed, would make futile and superfluous any challenge by concerned citizens to a federal agency decision involving uncertainty in science and technology.

One cannot overemphasize the importance of fair and reasoned decision-making in this case to the health, safety and welfare of millions of residents of Southern California. These nuclear power plants are located in a known seismically active area which is also one of the most densely populated and fastest growing areas in the country. The results of a major loss of containment accident caused by an earthquake would be truly disasterous.

B. THE DECISION IN THIS CASE IS IN CONFLICT WITH PREVIOUS DECISIONS OF THE SUPREME COURT AND THE D.C. COURT OF APPEALS

REGARDING THE APPROPRIATE STANDARD OF REVIEW OF FEDERAL ADMINISTRATIVE AGENCY DECISIONS.

The Court of Appeals for the District of Columbia Circuit in deciding this case, has adopted a standard of review which is in conflict with Supreme Court and D.C. Circuit cases and is also at odds with the very Supreme Court decision which the Court relies upon for support. Petitioners submit that this decision is in conflict with the following cases:

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

Greater Boston Television Corp. v. F.C.C., 444 F.2d 841 (D.C. Cir. 1970) cert. denied, 403 U.S. 923 (1971).

Ethyl Corp. v. E.P.A., 541 F.2d 1 (D.C. Cir. 1976) cert. denied, 426 U.S. 941 (1976).

Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

International Harvester v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

Baltimore Gas & Electric Co. v. N.R.D.C., -- U.S. --, 103 S. Ct. 2246 (1983).

1. This decision is in direct conflict with the decision in Citizens to Preserve Overton Park v. Volpe.

The case of Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), sets the standard for judicial review of federal administrative agency decisions. The Court ruled that, even though a standard of review less stringent than the substantial evidence test applied, and there was a presumption of regularity in the decision, "... that presumption is not to shield this action from a thorough, probing, in depth review." Id. at 415.

The Court continues:

> Scrutiny of the facts does not end, however with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice was not "arbitrary capricious or abuse of discretion, or otherwise not in accordance with law. [citations omitted] To make this finding the Court must consider whether the decision

> was based on a consideration of relevant factors and whether there has been a clear error of judgment. (emphasis added) Id. at 416.

Petitioners submit that this Appeals Court panel has not conducted a thorough, probing in depth review. In fact, it has deferred to the NRC at every instance with little explanation.

More specifically, the Court did not consider whether the decision was based on a consideration of all relevant factors. It is uncontested that the NRC did not fully consider or decide the question of whether the Cristianitos Fault, the fault closest to the plant, is active. The Court does not address this issue but merely rules that it was in the discretion of the Board to exclude Petitioner's evidence. Carstens v. NRC, No. 83-1879, Opinion pp. 11-14, (See Appendix p. 1, 11-14) (hereinafter cited as Opinion p. ___.) This evidentiary ruling does not address the main issue of

whether it was prejudicial error to foreclose the entire issue from decision. The Appeals Court ignores its own footnote #8 found on p. 7 of the Opinion wherein the Court states:

> Among other things, the regulations require that "[f]or faults, any part of which is within 200 miles of the site and which may be of significance in establishing the Safe Shutdown Earthquake, [a] determination [be made] whether these faults are to be considered as capable faults." Id. Sec. IV(a)(7). According to the regulations:
>
> A "capable fault" is a fault which has exhibited one or more of the following characteristics:
>
> (1) Movement at or near the ground surface at least once within the past 35,000 years or movement of a recurring nature within the past 500,000 years.
>
> (2) Marco-seismicity instrumentally determined with records of sufficient precision to demonstrate a direct relationship with the fault.
>
> (3) A structural relationship to a capable fault according to characteristics (1) or (2) of this paragraph such that movement on one could be reasonably

expected to be accompanied by movement on the other. (Appendix p. 7).

There is no question that the fault is within 200 miles of the site (it is less than one mile). Its close proximity to the site makes it necessarily significant in establishing the Safe Shutdown Earthquake and there is evidence on the record which indicates that it has experienced movement within 35,000 years or recurrent movement within 500,000 years and that it has a structural relationship to a capable fault. Yet, the issue was not decided as required by the regulations and the Appeals Court finds no fault with that lack of decision. Opinion p. 13-16; Appendix p. 13-16.

2. This decision is in conflict with the decision in Greater Boston Television v. F.C.C., 444 F.2d 841 (1970).

The decision in Greater Boston Television Corp. v. F.C.C., 444 F.2d 841

(1970) set further standards for review wherein it held:

> Its supervisory function calls on the court to intervene not merely in the case of procedural inadequacies ... but more broadly if the court becomes aware, especially from a combination of danger signals that the agency has not really taken a 'hard look' at the salient problems and has not genuinely engaged in a reasoned decision-making. Id. at 851. (emphasis added)

The Court in Greater Boston goes on to state a guiding principle that is appropriate in the present case:

> Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice. It furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-makers. Id. at 852.

The Court of Appeals has totally ignored numerous danger signals including but not limited to:

a. The NRC called for a speeding up of this licensing hearing.

b. The Licensing Board held a final prehearing conference prior to discovery being complete in apparent disregard of the regulations.

c. The Licensing Board established an impossible hearing schedule.

d. The Licensing Board erroneously foreclosed a "crucial safety issue" from consideration (namely whether the Cristianitos Fault is active) and the Appeals Board found this clear error to be harmless even though it resulted in the issue not being considered and decided.

e. The Licensing Board struck the entire testimony of Intervenors highly qualified expert witness regarding the activity of the Cristianitos Fault.

f. The Licensing Board redecided an issue stipulated to and decided in the construction permit hearing without notice

to Intervenors that the issue was subject to redecision.

g. The Board admitted over 11,000 pages of testimony (FSAR) for the truth of all of the matters contained in it without allowing petitioners to know who wrote it or to cross-examine any of the authors.

h. The Licensing Board relied solely on testimony of highly paid and biased witnesses of the applicant and completely ignored or misconstrued the testimony of truly independent witnesses, including one who testified for the Board itself.

i. The Licensing and Appeals Board used vague and ambiguous terms such as "conservative" in an arbitrary fashion with no attempt to attach any meaning to the words.

The Court ignored all of these "danger signals", which call for close scrutiny in furtherance of the Courts supervisory function, and simply deferred to the NRC.

Petitioners respectfully submit that this decision does nothing towards "enabling the public to repose confidence in the process as well as the judgments of its decision-makers." Id. at 852.

3. This Decision is Contrary to Those Cases Which Directly Address the Standard of Review In Cases Involving Scientific Uncertainty.

This decision is also contrary to previous rulings regarding the Appeals Court role in environmental cases where there is scientific uncertainty. In Ethyl Corp. v. E.P.A., 541 F.2d 1 (D.C. Cir. 1976) cert. denied, 426 U.S. 941 (1976), Judge Wright, while recognizing that the standard of review is a deferential one and that the Court should not substitute its own judgment for that of the agency, went on to rule that:

> This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the

> appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors. Moreover, it must engage in a "substantial inquiry" into the facts, one that is "searching and careful." [Citations Omitted] This is particularly true in highly technical cases such as this one.
> Id. at 34-35.

Most on point, Judge Wright goes on to state:

> The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function.
> Id. at 36.

The Court in the present case did not engage in "substantial inquiry" and "searching and careful review" in this highly technical case but rather engaged in the "rubber-stamping" condemned by Judge Wright citing "uncertainty" as the very reason for doing so. (See Appendix p. 21).

Judge Starr in the present case has ruled that:

> The uncertainty of the science of earthquake prediction only serves to emphasize the limitations of judicial review and the need for greater deference to policymaking entitites. Opinion p. 21. Appendix p. 21.

Petitioners submit that this standard of review as set forth by Judge Starr is at opposite poles with the standard of review as established by the Appellate Courts and by the Supreme Court in cases where there is scientific uncertainty. This standard of review results in virtually no review at all. And that is what happened in this case.

In Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), the Court sets forth which interests should have a special claim to judicial protection,

> ... courts are increasingly asked to review administrative action that touches on

> fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding. (Id. at 597-598.)

The Court seems to have totally ignored this important charge. It has given almost total deference to the NRC decision and has not seriously questioned any of their rulings of law or findings of fact or even raised a question regarding the procedures that took place in this case. This occured despite the fact that the health, safety and lives of millions can be severely impacted if the NRC's decision is wrong. The public is entitled to more than this cursory review. This decision does nothing to assure a reasoned decision that can be held up to the scrutiny of the scientific community and the public as called for by the Court in International Harvesters v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973).

4. The Court in Its Opinion Misapplies the Supreme Court Decision in Baltimore Gas v. National Resources Defense Council, --U.S.-- 103 S.Ct. 2246 at 2256 (1983) and Improperly Puts Great Reliance On It For Its Ruling In This Case.

Petitioners respectfully submit that this opinion has misapplied and misconstrued the decision in Baltimore Gas v. National Resources Defense Council, --U.S.-- 103 S. Ct. 2246 regarding the effect of scientific uncertainty on the scope of judicial review. The Opinion states, "The uncertainty of the science of earthquake prediction only serves to emphasize the need for greater deference to policy making entities." (Opinion p. 21, citing Baltimore Gas v. National Resources Defense Council, -- U.S. --, 103 S.Ct. 2246, at 2256 (1983).

The Court of Appeals overlooks the fact that in Baltimore Gas the question was

whether there was reasoned decisionmaking and whether all relevant factors were fully considered by the NRC including the uncertainty of predicting that there would be "zero release" of radioactive materials. Baltimore Gas, supra at p. 2256-2257. In Baltimore Gas there was no question that the NRC specifically detailed all areas of uncertainty and fully discussed why they were insubstantial, and the Court did not in any way rule that uncertainty, by itself, requires more deference to the agency. In fact, Baltimore emphasized that the NRC had considered all uncertainties and articulated a rational connection between the facts found and the choice made. Id at p. 2257. This is in line with a series of cases which require that relevant uncertainties be fully disclosed and considered with reasons given why the uncertainty was resolved in a certain way. Ethyl Corp. v. E.P.A., 541 F.2d 1 (D.C.

Cir. 1976); Nat'l Ass'n of Farmworkers v. Marshall, 628 F.2d 604 (D.C. Cir. 1980); Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 851 (1970).

Petitioners further point out that the Supreme Court in Baltimore Gas, enumerated three factors supporting greater deference in that particular case: 1) the agency action involved was intended to have a limited life; 2) the uncertainty present related to only one factor in a comprehensive table; and 3) the Commission was making predictions within its special area of expertise. 103 S.Ct. 2246 at 2255-6.

None of the three factors enumerated in Baltimore Gas are present in this case. This licensing decision is of a permanent nature with huge public safety ramifications; uncertainty plagues every issue in contention and colors every aspect of the licensing decision, and predictions

as to seismic activity are clearly not within the special area of expertise of the Nuclear Regulatory Commission. They are specifically not within the area of expertise of this Licensing Board, and the method by which the Licensing Board was given basic instruction biased them in favor of the applicants. (See footnote \1).

The Court, however, ignores this important distinction when it places great reliance on the statement in Baltimore Gas that "a reviewing court must remember that the Commission is making predictions, within its area of special expertise." (Opinion p. 21). It is uncontested, in the present case that the Commission Board members had no expertise whatsoever regarding seismology and geology. Therefore this rationale does not apply.

C. THE INADEQUACY OF THE COURT'S REVIEW IS COMPOUNDED BY ITS MISAPPREHENSION OF

NUMEROUS ISSUES OF LAW AND FACT AND ITS FAILURE TO ADDRESS OR DECIDE CERTAIN KEY ISSUES.

1) The court misapprehended the petitioners' contention regarding the issue of the capability of the Cristianitos Fault, (a crucial issue in the case) where it states that,

> Petitioners do not contend that these specific procedures and investigations were not performed; [referring to 10 CFR Part 100 App. A Sec. I set forth in footnote 8 of the opinion], rather, they take issue with the substantive outcome of these investigations. Unfortunately for them, it is in these substantive areas that this Court's deference to the agency justifiably reaches its zenith. Carstens v. NRC, No. 83-1879 Opinion page 8.

The Court here has totally misapprehended Petitioners' argument and misstates what happened in this case. Petitioners contended that the NRC committed error regarding this "crucial safety issue" by foreclosing the issue from decision. The

issue was simply not decided as required by the regulations. There was no substantive outcome or decision regarding this issue to which deference should be given.

The Court also misapprehends and misstates uncontested facts in this case where it states in its opinion at p. 13, "In addition, the Licensing Board expressly indicated its willingness to reconsider its prior finding of incapability [of the Cristianitos Fault] upon a showing of changed circumstances." (Appendix p. 13).

The Court again misapprehends a crucial issue, and mistakes the facts. The activity of the Cristianitos Fault has not been decided by this or any other NRC Licensing Board. The issue has never been decided and this "crucial safety issue" remains undecided to this day. The Licensing Board decision referred to by the Court unequivocally confirms that fact. 15 NRC 61, 78; (See Supp. App. p. 63).

2. The Court demonstrates its misapprehension regarding another key issue where it states:

> "Second, petitioners claim that the Licensing Board wrongfully redecided an issue foreclosed years before the construction permit stage as a result of a stipulation by the parties, namely, the seismic nature of the O.Z.D." (See, Opinion p. 10).

This is a misstatement of the issue demonstrating a misapprehension of the issue in contention. It is uncontested that not only did the NRC and SOUTHERN CALIFORNIA EDISON stipulate that the controlling geologic feature in the area, known as the Offshore Zone of Deformation, (OZD) was continuous and not segmented and at least 240 km long, it was decided by the NRC in its construction license decision that it was continuous and not segmented. Southern California Edison, et. al., LBP-73-76, 6 AEC 929, 942 (1973)(See Sup. App. p. 14). Further, it is uncontested that the parties to this operating

licensing proceeding agreed on the record and stipulated that the OZD was continuous and not segmented and was not subject to redecision. (See Transcript pp. 1046, 1051; J.A. p. 29-33). Yet, the Licensing Board decided that the OZD was segmented without notice to petitioners that the matter was even subject to redecision. The Appeals Court fails to address this issue, and curtly dismisses it by totally misinterpreting petitioners' argument. (Appendix p. 17).

4. The Court totally misapprehended the testimony of U.S.G.S. witness James F. Devine wherein it relies on his testimony and states: "That evidence [Devine's testimony] supports entirely the Licensing Board's interpretation" (that the OZD is segmented). Opinion p. 17. His testimony as quoted by the Court on p. 17 of the Opinion states:

> And so when attempting to describe then the earthquake

> potential one should assign to such a feature [the OZD], we argued that the three discrete zones should not represent individual fault zones and earthquake magnitudes dependent on each of those individual segments, but instead should consider them all in one segment, for the purposes of estimating earthquake size. (emphasis added)

His testimony clearly means just the opposite of the meaning attributed to it by the Court. Mr. Devine affirms that the zones are not segmented and should be considered "all in one segment" for purposes of estimating earthquake size. It makes no difference whether you call the OZD a zone of deformation or a fault. It means the same thing when it is agreed that it is "capable of an earthquake whose magnitude could be commensurate with the length of the zone". (6 AEC 929, 942, J.A.P. 453). And that length was decided and stipulated to as being "at least 240km long." Id. at 942. (See Supp. App. p. 16).

The Court clearly did not understand the meaning of the evidence presented. If it had understood what Mr. Devine meant by what he was saying it could not have ruled the way it did. And it certainly would not have quoted Mr. Devine for support.

5/ The Court's further misapprehension and its clear error in ruling on this issue is evidenced in its statement on page 18 of the Opinion wherein it states:

> Indeed, it seems curious, to say the least, to suggest that the utility-applicants would have stipulated to the USGS model if it were interpreted in the broad manner petitioners contend, since the net effect of such a stipulation would have been to foreclose almost all seismic issues from the licensing hearing and to doom the utilities' licensing applications to certain failure. (See Appendix p. 18).

As pointed out by the Court, the stipulated model states that the OZD is "an extensive linear zone of deformation at least 240 km long ... which must be considered potentially active and capable

of an earthquake whose magnitude could be commensurate with the length of the zone". Opinion p. 16; Appendix p. 16.

The fact remains that this stipulation was made both at the construction hearing and at the operating license hearing. It is also incorporated in the NRC construction license decision as part of that decision 6 AEC 929; 942; Supp. App. p. 14. The Court here is saying that this apparently clear language can't mean what it appears to mean because it would require a denial of the license. (See, also, footnote 15 of the Opinion wherein the Court suggests why that is true; Appendix p. 15. This is hardly the kind of reasoned analysis and searching and careful review that makes for opinions which can be "held up to the scrutiny of the scientific community and the public." (See International Harvester v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Circuit 1973). On the

contrary it defies reason for a court to rule that an obvious interpretation can't be correct because the utility-applicants would lose if it were correct. But this begging the question rationale is the basis for the Court's ruling.

6/ The Court misapprehends and commits clear error regarding the testimony of a key NRC witness, Dr. Slemmons. Dr. Slemmons' testimony was the cornerstone of the NRC's case regarding the maximum earthquake that could occur on the OZD. The Court in its Opinion on page 20 states:

> Petitioners' specific claim that Dr. Slemmons repudiated the methodology of his study upon cross-examination and adopted petitioners' mathematical expression of "conservatism" is utterly without merit. An examination of Dr. Slemmons' entire testimony reveals at least three occasions when the witness expressly rejected the measure of "conservatism" proffered by petitioners' counsel. See Tr. at 6230-31, J.A. at 375-76; Tr. at 6265-69, J.A. at 381-85; Tr. at 6272, J.A. at 388. (emphasis added) (Appendix p. 20).

The Court fails to apprehend or simply ignores the fact that Dr. Slemmons later retracted his testimony found on the pages cited by the Court. On page 6276 (4 pages after the last page cited by the Court) Dr. Slemmons retracts his previous testimony and agrees with the petitioners as to how best to arrive at a conservative maximum magnitude earthquake. When asked if he is changing his testimony, Dr. Slemmons agrees and says "I would now delete that particular sentence and not use that particular adjustment" Tr. p. 6276, l. 19-27, p. 6277, line 1; J.A. p. 392, 393. He goes on to say that instead he would add .694 to the figure of M_s=7.0 he previously testifed to. In the case of the 275 km length, that would yield a maximum magnitude of approximately 7.7 (See, Tr. p 6277, l. 2-7; J.A. p. 393).

It is only common sense to give no weight to evidence that is later

reconsidered and changed by the same witness. Yet, the Court in its opinion relies heavily on this retracted testimony.

7. One of the most obvious and serious misapprehensions of issues of law and fact is the Court's characterization and treatment of petitioners' argument regarding the effect of the uncertainty inherent in the science of seismology. The Court characterizes petitioners' argument as follows:

> Petitioners' Reply Brief indirectly addresses this defect in their argument. See Pet. Reply Brief at 21-26. The gist of petitioners' argument in this respect appears to be that the uncertainty of the science of seismology, coupled with the regulatory requirement that the inquiries be conducted in a "conservative manner," counsels the judiciary to require the NRC to accept the worst prediction of earthquake potential proffered to it, regardless of its perceptions of the relative credibility of the testimony. Opinion p. 21. (See Appendix p. 21).

Petitioners Reply Brief at 21-26 says

no such thing. Petitioners' argument as found in the Reply Brief at p. 22 is:

> Petitioners submit that by reason of the substantive and procedural flaws in the ASLB hearing below: 1) the degree of risk to the health and safety of the public was not properly defined, considered and determined; 2) the standard of safety applied to some perceived degree of risk was not properly defined, considered and determined; and 3) the degree of uncertainty actually present in the scientific data was not properly credited and disclosed. Reply Brief for Appellant p. 22.

The Court has, again, missed the point. Petitioners' argument was not that the uncertainty inherent in the science of seismology requires the NRC to simply accept the worst prediction of earthquake potential. The real point here is that uncertainty coupled with the requirement that the inquiries be conducted in a conservative manner make it incumbent upon the NRC and the Appeals Court to do the following:

a) Fully determine, define and consider the amount of risk this decision will place upon the general public including a full consideration of the worst predictions;

b) Determine and define what degree of risk the public is willing to accept and give a full justification for such a determination;

c) Analyze and disclose what degree of uncertainty is present in the scientific data and give reasons why the uncertainties were resolved in a certain way.

The NRC failed to perform any of these functions in its decisions.

Most significantly, the Court here is using "uncertainty" to justify abdicating its responsibility to take a hard look at the NRC decision. This establishes a very dangerous precedent and would allow all agencies which decide matters dealing with uncertainty in science and technology to go

virtually unchecked by the Courts. Such a precedent should not be allowed to stand.

8. The Court demonstrates a serious misapprehension regarding the meaning of 10 CFR 2.752 and, more importantly, the Court's responsibility to interpret the law, when it curtly dismisses as "patently frivolous", Petitioners' contention that such section requires that the prehearing conference be held after discovery is complete. Opinion p. 26, 17; Appendix p. 26, 27.

Petitioners were ordered to participate in a final prehearing conference 22 days before discovery was complete. This was also prior to the Licensing Board ruling on motions to compel Answers to Interrogatories brought by Petitioners CARSTENS, et. al. against the NRC. This was apparently contrary to 10 CFR 2.752 which states:

> ... A prehearing conference held under this section in a

> proceeding involving a construction permit of operating license shall be held within sixty (60) days after discovery has been completed, or such other time as the Commission or the presiding officer may specify. 10 CFR Sec. 2.752(a) (1983). (Appendix p. 38).

It seems clear that what was intended by this section was that the final prehearing conference should be held within 60 days <u>after discovery is complete</u>, or more than 60 days after discovery if the presiding officer so decides. But it does require that it be after discovery is complete. Why have any language in the section that it be held "after discovery is complete" if the presiding officer can order it to be held at any time at all? If that is what was intended when the section was enacted, the section would simply read, "A prehearing conference held under this section ... may be held at any time as the Commission or presiding officer may specify." (<u>See</u>, Appendix p. 38). Yet, the

Court summarily dismisses Petitioners' objection as "patently frivolous" without looking into the intent at all. A review of the complete text of 10 CFR 2.752 reveals that the final prehearing conference is to serve many functions. Discovery is not one of them. Yet this final conference was used to rule on outstanding discovery disputes. (See Revised Prehearing Conference Order, J.A.p. 516.) On the other hand, 10 CFR 2.751(a) defines the purposes of a special prehearing conference. 10 CFR 2.751(d) specifically provides for review of discovery. (See 10 CFR 2.751(a)(d).) (See Appendix p. 38). It should be clear then that what was intended was that discovery be resolved by a special prehearing conference and that discovery be completed

before the final prehearing conference is held.

To summarily dismiss this contention as "patently frivolous" is an abdication of the Court's responsibility to determine the intent of the regulations and the reasonableness of the NRC's interpretation of its own rules in light of the severe hardships it placed on the Petitioners. The Court again failed in its responsibility to interpret the law and to assure fair proceedings and deferred, almost blindly, to the NRC.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit Court of Appeals.

Respectfully submitted,
WALTER W. HEISER
RICHARD J. WHARTON
UNIVERSITY OF SAN DIEGO
ENVIRONMENTAL LAW CLINIC
Alcala Park
San Diego, CA 92110
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 1985, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to (See attached list). Counsel for the Respondents. I further certify that all parties required to be served have been served.

WALTER W. HEISER
RICHARD J. WHARTON
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
ENVIRONMENTAL LAW CLINIC
Alcala Park
San Diego, CA 92110
Counsel for Petitioner

Charles R. Kocher, Esq.
James A. Beoletto, Esq.
Southern California
Edison Company
2244 Walnut Grove Avenue
Rosemead, CA 91770

David R. Pigott, Esq.
Edward B. Rogin, Esq.
Samuel B. Casey, Esq.
John A. Mendez, Esq.
Jon B. Streeter, Esq.
Of Orrick, Herrington &
Sutcliffe
A Professonal Corp.
600 Montgomery Street
San Francisco, CA 94111

Samuel J. Chilk
Secretary of the
Commission
U.S. Nuclear
Regulatory Commission
Washington, D.C. 20555

Alan R. Watts, Esq.
Rourke & Woodruff
California First
Bank Bldg.
10555 North Main Street
Santa Ana, CA 92701

John A. Bryson, Esq.
Land and Natural
Resources Div.
U.S. Department
of Justice
Washington, D.C. 20530

E. Leo Slaggie, Esq.
Sheldon L. Trubatch,Esq.
Richard L. Black, Esq.
U.S. Nuclear
Regulatory Commission
Office of the
General Counsel
Washington, D.C. 20555

AFFIDAVIT OF FILING

I, WALTER W. HEISER, declare:

I am a member of the of the Bar of the above-entitled Court. The foregoing WRIT OF CERTIORARI dated February 4, 1985, was timely filed on February 5, 1985, by a true copy thereof being deposited in the United States mail in San Diego, California, on February 5, 1985, enclosed in a sealed envelope with postage thereon fully prepaid, properly addressed to the U.S. Supreme Court.

Dated this 5th day of February, 1985, at San Diego, California.

WALTER W. HEISER

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO)

Subscribed and sworn to before me this 5th day of February, 1985.

JUNE A. FLOWER
Notary Public for
the State of California

OFFICIAL SEAL
JUNE A FLOWER
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My comm. expires AUG 21, 1988

APPENDIX TO PETITION
FOR WRIT OF CERTIORARI

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1879

AUGUST S. CARSTENS, FRIENDS OF THE EARTH, et al.,
PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

SOUTHERN CALIFORNIA EDISON COMPANY, et al.,
INTERVENORS

Petition for Review of an Order of the
Nuclear Regulatory Commission

Argued May 29, 1983

Decided September 7, 1984

Richard J. Wharton, for petitioners.

Sheldon L. Trubatch, Attorney, Nuclear Regulatory Commission, with whom *E. Leo Slaggie*, Acting Solicitor,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

000001

Richard L. Black, A Laurence Ralph, Attorneys, Nuclear Regulatory Commission, *David Shilton* and *John A. Bryson*, Attorneys, Department of Justice, were on the brief, for respondents.

David R. Pigott, for intervenors. *Edward B. Rogin* and *Samuel B. Casey* also entered appearances for intervenors.

Before: BORK, SCALIA and STARR, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* STARR.

STARR, *Circuit Judge*: This petition for review challenges the decision of the Nuclear Regulatory Commission (NRC or Commission) granting operating licenses for Units 2 and 3 of the San Onofre Nuclear Generating Station (SONGS Units 2 and 3). These facilities are situated near San Clemente, California within the perimeter of the United States Marine Corps Base at Camp Pendleton. The challenge is mounted by August S. Carstens, an individual residing in San Diego, California, and Friends of the Earth, a California nonprofit corporation. Mr. Carstens and Friends of the Earth were permitted in 1977 to intervene and participate in the NRC proceedings culminating in the issuance of the operating licenses under review here.

I

A

The issues before us relate primarily to the location of the SONGS facilities in an area of seismic activity in Southern California. These issues are by no means new. They were raised before the Commission by prior intervenors, who did not participate in the operating license proceeding, at the time the utility-applicants sought construction permits to build these facilities. Those permits were granted by the Atomic Energy Commission (now

000002

the NRC) in 1973.[1] In March 1977, applications were filed for operating licenses for the two SONGS Units. Following petitioners' successful motion to intervene in May 1977, the NRC's Atomic Safety and Licensing Board (Licensing Board) admitted for discovery purposes petitioners' contention that the seismic design of the facilities was inadequate:

> The seismic design basis for SONGS 2 and 3 is inadequate to protect the public health and safety and does not comply with [applicable regulations] in that the earthquake which could cause the maximum vibratory ground motion has not been assigned as the safe shutdown earthquake.

Prehearing Conference Order of January 27, 1978 (reprinted in Petitioners' Brief at 6-7).

Discovery was undertaken with respect to the seismic issues pursuant to the Licensing Board's August 27, 1980 order. Written testimony was filed by the petitioners, and answers to interrogatories were provided by the applicants and the NRC staff.[2]

---

[1] Construction permit proceedings with respect to SONGS Unit I began in the early 1960's. During those proceedings, the issue of the facility's location in an area of seismic activity was also raised and adjudicated by the AEC.

[2] Petitioners note that the interrogatories were resisted by the NRC staff and the applicants, necessitating motions to compel which were not resolved by the Board until very shortly before the hearings began in 1981. Intervenors vigorously protest that discovery deadlines imposed upon them were "onerous" and resulted in "great cost to their ability to prepare the written testimony of volunteer witnesses and . . . great cost to their being able to prepare for cross-examination." Petitioners Brief, at 8-9. This asserted burden constitutes one factor pointed to by petitioners in their argument that the NRC throughout this proceeding evidenced hostility and bias toward these intervenors, a contention we address below.

0300303

The hearings began in June 1981 and consumed 25 days. Twenty-eight witnesses testified before the hearings concluded on August 4, 1981. Testimony at the hearings addressed a number of issues raised by the intervenor-petitioners with respect to the adequacy of the seismic design for SONGS Units 2 and 3. Of especial relevance was testimony with respect to three fault areas located in the vicinity of the SONGS Units. The first area is a zone known as the "Offshore Zone of Deformation" (OZD), situated off the coast of Southern California. One hotly contested issue before the NRC's Licensing Board was whether the OZD was a single, thoroughgoing fault or, instead, was a zone of linked segments of folds and faults unlikely to rupture along its entire length. The second fault zone situated even closer than the OZD to the SONGS facility is the Cristianitos fault, located at the closest point of its approach less than one mile from the plant.[3] Throughout the lengthy prior proceedings involving nuclear power facilities at San Onofre, the Cristianitos fault was deemed by the NRC to be inactive. Petitioners vigorously contested this long-held assumption by virtue of two earthquakes that occurred near the San Onofre site in 1975.[4]

The third geologic feature examined in the Licensing Board hearings was the *offshore* Cristianitos Zone of Deformation, not to be confused with the *on-land* Cristianitos fault. Of specific concern at the Licensing Board

---

[3] The NRC represents that the Cristianitos fault is "about one mile" from the SONGS facility at the point of its closest approach, whereas the applicants-intervenors state that the fault is situated "slightly over one-half mile from the site." Petitioners represent that the fault is "within one-half mile of the plant."

[4] Petitioners represent that the two earthquakes were of the magnitude 3.3 and 3.8 on the Richter scale. "The preliminary locations were near the central portion of the Cristianitos fault." Petitioners Brief at 19.

00 004

hearings was the relationship of the Cristianitos Zone of Deformation (CZD) to the OZD and the Cristianitos fault.

Following the lengthy hearings on the seismic issues, the NRC's Licensing Board rejected petitioners' challenge in a decision rendered in January 1982. Consistent with governing procedures,[5] petitioners took an administrative appeal from the Licensing Board to the NRC's Atomic Safety and Licensing Appeal Board (Appeal Board). Rejecting petitioners' various challenges, the Appeal Board in March 1983 affirmed the Licensing Board's determination.[6] In June 1983, the NRC declined to review the Appeal Board's decision, thereby upholding the grant of operating licenses for the two Units. This petition for review followed.

B

Before turning to petitioners' challenges, we pause to examine briefly the regulatory framework within which this dispute has been addressed by the Commission.

The Atomic Energy Act (the Act), 42 U.S.C. §§ 2011, *et seq.* (1982), establishes a two-step procedure for the issuance of licenses to operate nuclear power plants. First, an applicant must seek from the NRC a construction permit to build the proposed facility. In such instances, section 189 of the Act requires that the Commission hold a public hearing before granting a construction permit. *Id.* § 2239(a). After obtaining a con-

---

[5] A summary of NRC licensing procedures with respect to nuclear power plants is set forth in Part B, which follows immediately below.

[6] The Appeal Board did determine, however, that the Licensing Board had committed nonreversible errors in several respects, as we will discuss more fully *infra* in treating petitioners' contentions.

000105

struction permit, an applicant must subsequently return to the Commission to secure an operating license. The Act requires the NRC to hold a second hearing at this stage only if requested by an interested person. *Id.*

Both construction permit and licensing hearings are conducted by an Atomic Safety and Licensing Board. Appeals from decisions of the Licensing Board are taken to the Atomic Safety and Licensing Appeal Board. Both the Licensing and Appeal Boards determine only whether issuance of a license is authorized. It is the Commission itself that actually issues the license. 10 C.F.R. §§ 2.760, 2.760a (1983). Before issuing a license, the Commission must reasonably assure itself that "the applicant will comply with the regulations . . . and that the health and safety of the public will not be endangered." *Id.* § 50.40 (a). However, as we observe below, the NRC is given broad discretion to determine what technical specifications are necessary to protect the public health and safety.

In the licensing process, NRC regulations mandate administrative consideration of the physical characteristics of proposed sites for nuclear facilities, including the locations' geologic and seismic makeup. *See* 10 C.F.R. § 100.10(c) (1983). The governing portion of the regulations, found in 10 C.F.R. Part 100, Appendix A, "describes the nature of investigations required to obtain the geologic and seismic data necessary to determine site suitability and to provide reasonable assurance that a nuclear power plant can be constructed and operated at a proposed site without undue risk to the health and safety of the public." *Id.* § 100.10(c)(1). The siting criteria and the investigations prescribed in Appendix A are, of necessity, broad and leave wide discretion to the Commission.[7] The investigations mandated in the

[7] The regulations note that "[t]hese criteria are based on the limited geophysical and geological information available to

regulations are designed with the end of arriving at a "Safe Shutdown Earthquake" to be used as a basis for the seismic design specifications imposed in the construction of the plant.[8] The regulations define "Safe Shutdown Earthquake" as:

> that earthquake which is based upon an evaluation of the maximum earthquake potential considering the regional and local geology and seismology and specific characteristics of local subsurface material. It is that earthquake which produces the maximum vibratory ground motion for which certain structures, systems, and components are designed to remain functional.

---

date concerning faults and earthquake occurrence and effect. They will be revised as necessary when more complete information becomes available." 10 C.F.R. Part 100, App. A § I (1983).

[8] Among other things, the regulations require that "[f]or faults, any part of which is within 200 miles of the site and which may be of significance in establishing the Safe Shutdown Earthquake, [a] determination [be made] whether these faults are to be considered as capable faults." *Id.* § IV(a)(7). According to the regulations:

> A "capable fault" is a fault which has exhibited one or more of the following characteristics:
>
> (1) Movement at or near the ground surface at least once within the past 35,000 years or movement of a recurring nature within the past 500,000 years.
>
> (2) Marco-seismicity instrumentally determined with records of sufficient precision to demonstrate a direct relationship with the fault.
>
> (3) A structural relationship to a capable fault according to characteristics (1) or (2) of this paragraph such that movement on one could be reasonably expected to be accompanied by movement on the other.

Id. § III(g). Each capable fault is then examined to determine whether it should be used as the controlling geological formation for arriving at the Safe Shutdown Earthquake.

Id. § III(c). The regulations mandate that the procedures prescribed for arriving at the Safe Shutdown Earthquake "be applied in a conservative manner." *Id.* § V(a)(1)(iv).[9] Petitioners do not contend that these specific procedures and investigations were not performed; rather, they take issue with the substantive outcomes of those investigations.[10] Unfortunately for them, it is in these substantive areas that this court's deference to the agency justifiably reaches its zenith.

II

The issues presented in this case arise in the context of a regulatory scheme that this court has recognized is "virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968). *See also Westinghouse Electric Corp. v. Nuclear Regulatory Commission*, 598 F.2d 759, 771 (3d Cir. 1979). Section 182 of the Atomic Energy Act vests

---

[9] Although, as petitioners note, no specific definition of the phrase "applied in a conservative manner" is provided, the regulations do mandate the application of several conservative assumptions. For example,

> [t]he magnitude or intensity of earthquakes based on geological evidence may be larger than that of the maximum earthquakes historically recorded. The accelerations at the site shall be determined assuming that the epicenters of the earthquakes of greatest magnitude or the locations of highest intensity related to the tectonic structures are situated at the point on the structures closest to the site.

Id. § V(a)(1)(i).

[10] As we will see in Part III, below, petitioners do mount various procedural attacks against the Commission's decision here, but those contentions go principally to the manner in which the Licensing Board hearings were conducted.

JJ0 J J8

broad discretion in the NRC to establish qualifications for licensees of nuclear facilities:

> In connection with applications for licenses to operate production or utilization facilities, the applicant shall state such technical specifications . . . and such other information *as the Commission may*, by rule or regulation, *deem necessary in order to enable it to find* that the utilization or production of special nuclear material will be in accord with the common defense and security *and will provide adequate protection to the health and safety of the public.*

42 U.S.C. § 2232(a) (1982) (emphasis added). Recognition of the breadth of this delegation of authority to the Commission necessarily informs our examination of petitioners' challenges.

Indeed, the Supreme Court has made it crystal clear that our review of NRC licensing decisions is "limited." In reversing a prior decision of this court, the Court stated:

> We are acutely aware that the extent to which this Nation should rely on nuclear power as a source of energy is an important and sensitive issue. Much of the debate focuses on whether development of nuclear generation facilities should proceed in the face of uncertainties about their long-term effects on the environment. Resolution of these fundamental policy questions lies, however, with Congress and the agencies to which Congress has delegated authority, as well as with state legislatures and, ultimately, the populace as a whole. Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes.

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, —— U.S. ——, 103 S.Ct. 2246, 2252 (1983). We conclude that in issuing the operating li-

censes at issue in this case the NRC acted well within its broad stautory authority. The voluminous record persuasively evidences the care with which the NRC discharged its statutory duties. Without hesitation, we find that its decision is supported by substantial evidence, and that its actions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706 (1982).

III

Petitioners mount various arguments against the NRC's determination that the seismic design of SONGS Units 2 and 3 provides a reasonable assurance of safety against earthquake hazards, and against the procedures employed by the Commission in arriving at that conclusion.[11] First, petitioners challenge the Licensing Board's decision "foreclosing" from consideration the issue of the "capability" of the Cristianitos fault, and the Appeal Board's decision that the Licensing Board's foreclosure of that issue constituted nonprejudical error. Second, petitioners claim that the Licensing Board wrongfully redecided an issue foreclosed years before the construction permit stage as a result of a stipulation by the parties, namely the seismic nature of the OZD. Third, petitioners allege that the "Safe Shutdown Earthquake" magnitude and peak ground acceleration designations reached by the NRC are unsupported by substantial evidence. Fourth, petitioners contend that the Licensing Board committed prejudicial error when it admitted into evidence the 30-volume Final Safety Analysis Report, prepared by the utility-applicants, for the truth of the matters contained therein. Fifth, petitioners as-

[11] This appeal is limited to the Commission's seismic design findings. Challenges filed by other petitioners to the emergency preparedness of SONGS Units 2 and 3 are pending before the court in another case transferred from the Ninth Circuit. *GUARD v. N.R.C.*, No. 84-1091.

00010

sert that the NRC's licensing decision is rendered arbitrary and capricious by the Commission's failure to define with particularity its broad regulatory requirement that the specified seismic siting procedures be "applied in a conservative manner." 10 C.F.R. Part 100 App. A § V(a)(1)(iv) (1983). Finally, petitioners press several points which, in their view, demonstrate the overall unfairness of the hearing afforded them and the inability of the NRC to decide the pertinent issues in an unbiased manner. We examine each of the arguments in turn.

A

During the hearing before the Licensing Board, petitioners sought to introduce evidence to establish that the Cristianitos fault, located within one mile of the Units, was "capable," as defined in the NRC's regulations, and should be considered as the controlling geologic structure for arriving at the "Safe Shutdown Earthquake" for the SONGS facility. After hearing petitioners' evidence in its entirety, the Licensing Board struck the proffered evidence on the grounds that (1) it lacked probative value because of "the witness' sketchy qualifications as an expert, the superficiality and questionable accuracy of his pre-filed evidence, and his demeanor upon cross-examination," and (2) petitioners were foreclosed from litigating the capability of the Cristianitos fault because that issue, while the subject of much investigation at the early stages of the proceedings, was not contested at the construction permit hearing. *See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, 15 N.R.C. 61, 76-82 (1982) [hereinafter Licensing Board Decision], Joint Appendix at 548-51 [hereinafter J.A.]. The Licensing Board ruled that the Cristianitos-capability issue was foreclosed notwithstanding the fact that, since petitioners were neither parties nor in privity with any party to the construction permit proceedings, foreclosure was not warranted under judicial preclusion doctrines. *Id.* at 80, J.A. at 550.

On administrative appeal, the Appeal Board concluded that the Licensing Board had erred in determining that petitioners were foreclosed from litigating the capability *vel non* of the Cristianitos fault, but nonetheless found the error nonprejudicial. *See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, 17 N.R.C. 346, 351, 355 (1983) [hereinafter Appeal Board Decision], J.A. at 639, 641. The Appeal Board, after fully reviewing the record, including the evidence stricken by the Licensing Board, based its conclusion on the Licensing Board's independent ground that the evidence proffered by petitioners lacked probative value and on petitioners' failure to make any offer of proof as to what more they could have presented but for the foreclosure ruling. *See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, 15 N.R.C. 688, 697 (1982) [hereinafter Appeal Board Stay Decision], J.A. at 619.[12] Petitioners now

---

[12] At oral argument before the Appeal Board, counsel for petitioners informed the Board that the only effect of the Licensing Board's foreclosure ruling on the record available for their review was the absence of cross examination of two staff witnesses—Dr. Reiter and Mr. Cardone. The Appeal Board directly addressed the potential impact of this lack of cross-examination in finding the error harmless:

> We have reviewed the record material (including that which was formally stricken) and do not find the gap in cross-examination prejudicial. [Petitioners] did in fact cross-examine Mr. Cardone and Dr. Reiter as to post-1973 evidence dealing with the potential capability of the Cristianitos fault. What they were precluded from pursuing by virtue of the Licensing Board's foreclosure ruling was pre-1973 information bearing on the fault's capability. But as to that, [petitioners] had had virtually no questions to ask when cross-examining Dr. Biehler, the applicant's consultant, whose testimony covered the Cristianitos fault in its full historical range. And intervenors do not quarrel with the scope of their cross-examination of Dr. Biehler.

Appeal Board Stay Decision at 697, J.A. at 619 (references to hearing transcript omitted). Petitioners' argument that de-

challenge the Appeal Board's finding of nonprejudical error; we find it more than adequately supported by the record.

Initially, we must note that it is misleading to refer to the Licensing Board's ruling as a "foreclosure." The Licensing Board in no wise precluded petitioners *ab initio* from presenting evidence concerning the capability of the Cristianitos fault. Rather, as we have seen, the Board received petitioners' proffered evidence in full before ordering it stricken as lacking in probative value. The Board's actions demonstrate a full recognition of the importance of a potential showing of the fault's capability to the ultimate determination of the appropriate safeguards for public health and safety. *See* Licensing Board Decision at 78, J.A. at 549 ("If the Cristianitos were shown to be a capable fault, it would certainly be significant, and perhaps crucial, to the safety of the San Onofre facility"). In addition, the Licensing Board expressly indicated its willingness to reconsider its prior finding of incapability upon a showing of changed circumstances. *Id.* After receiving all of the petitioners' evidence, the Board simply ruled that such a showing had not been made. *Id.*

It is, of course, beyond peradventure that the Licensing Board enjoys authority to exclude evidence it finds unreliable or otherwise lacking in probative value. *See* 5 U.S.C. § 556(d) (1982); 10 C.F.R. § 2.743(c) (1983). Since the Board is obviously best situated to assess the credibility and demeanor of witnesses, this court must defer to that judgment so long as it is reasonable. *See generally Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496-97 (1951);

---

privation of cross-examination constitutes per se reversible error is without merit. *See United States v. Gambler*, 662 F.2d 834 (D.C. Cir. 1981) (harmless error rule applied in criminal case); *Wasson v. SEC*, 558 F.2d 879, 884 (8th Cir. 1977).

Second Taxing District of Norwalk v. Federal Energy Regulatory Commission, 683 F.2d 477, 485 (D.C. Cir. 1982); *Penasquitos Village, Inc. v. National Labor Relations Board*, 565 F.2d 1074, 1076-80 (9th Cir. 1977). The reasonableness of the Licensing Board's decision striking the testimony of petitioners' expert witness, Richard Simons, is amply supported by the record. First, Mr. Simons' specific credentials in this field were reasonably found wanting. Mr. Simons received a B.S. degree in geology and geophysics in 1959 from MIT, which was plainly an auspicious beginning. But he has since performed no graduate work and, more fundamently, is not and does not purport to be a recognized expert in what petitioners themselves recognize as an extremely specialized science—seismology. Second, his methodology was deemed highly dubious, on grounds expressly set forth in detail in the Licensing Board's decision.[13] We

---

[13] A comparison of the methodologies employed by Mr. Simons and Dr. Biehler, a scientist hired by the applicants and relied upon by the Licensing Board, provides a telling indictment of the relative probative value of Mr. Simons' testimony. The Licensing Board describes Mr. Simons' methodology as follows:

> What [Simons] did, essentially, was transfer earthquake location data covering the period 1932 to 1980 from the epicenter catalogue published by the California Institute of Technology to a map of the vicinity of the Cristianitos fault. He then drew error circles of different sizes around the estimated epicenters, the size depending upon the presumed accuracy of the location.

Licensing Board at 77, J.A. at 548. In contrast, the Appeal Board described the studies conducted by Dr. Biehler in order to determine whether two small earthquakes that occurred in January of 1975 were related to the Cristianitos fault as follows:

> The applicant's investigations included a geomorphic study, an evaluation of microseismic events, a study of focal mechanisms, the construction of a subsurface contour map, an updating of historic seismicity, and geophysical surveys . . . . Through calibration blasts, Dr.

000014

cannot conclude that the Licensing Board erred in striking this testimony as lacking in probative value, especially in light of the evidence already on the record relating to the capability of the Cristianitos fault.

The relationship between the Cristianitos fault and the location of the San Onofre nuclear facility has been thoroughly examined since the construction of the facility was first contemplated over twenty years ago. Throughout this long nistory, the Cristianitos fault has been considered inactive. *See Southern California Edison Co.*, 2 A.E.C. 366, 376 (1964), J.A. at 427. Indeed, until petitioners entered the proceedings at the operating license stage, no party in the long and spirited debate over plant safety had apparently considered the capability of the Cristianitos fault even worth contesting. *See* Licensing Board Decision at 78, J.A. at 549. That is, frankly, not surprising. Uncontested evidence on the record indicates that the fault has been inactive for at least 125,000 years, which the Appeal Board found to be persuasive evidence of incapability. Appeal Board Stay Decision at 699, J.A. at 621. The NRC has carefully re-examined this determination whenever any new evidence was proffered to bring the conclusion into doubt. *See, e.g.*, Appeal Board Decision at 356, J.A. at 642 (noting that the evidence with respect to the 1975 earthquakes was inconsistent with any possibility that those

---

> Biehler developed a model to locate more accurately the epicenters of the small earthquakes and to fix limits on their hypocentral depths. The difference in faulting style and spatial separation from the Cristianitos fault led him to conclude that the events could not be associated with that fault.

Appeal Board Stay Decision at 699-700, J.A. at 621-22. It is little wonder that this comparison caused the Licensing Board to "question whether any useful conclusions could be drawn about the seismicity of the Cristianitos fault itself from this circle drawing exercise." Licensing Board Decision at 77, J.A. at 548.

earthquakes were related to the Cristianitos fault). And, consistent with its past policy, the NRC allowed petitioners fully to present their evidence before ruling on its admissibility.

Based upon the record as a whole, we conclude that the NRC properly excluded petitioners' evidence. Petitioners can demonstrate no harm resulting from the Licensing Board's ruling "foreclosing" from further consideration the capability of the Cristianitos fault, particularly in light of their undisputed failure to make an offer of proof.

B

Petitioners next argue that the Licensing Board committed reversible error when it "redecided" the geological nature of the Offshore Zone of Deformation, the controlling geologic formation relevant to SONGS, in contravention of a stipulation entered into by the parties at the construction permit stage.[14] Despite what the Licensing Board described as "an honest difference of opinion . . . between the experts" as to the actual geological nature of the OZD, the parties to that earlier proceeding agreed prior to the construction permit hearing to have the adequacy of the proposed "design basis earthquake" adjudged in the framework of the geological model proposed by the United States Geological Survey (USGS). *See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, 6 A.E.C. 929, 943 (1973) [hereinafter Construction Permit Decision], J.A. at 454. The USGS model described the OZD as "an extensive linear zone of deformation, at least 240 km long, . . . [which] must be considered potentially active and capable of an earthquake whose magnitude could be commensurate with the length of the zone." *Id.* at 942, J.A. at 453. The parties disagree over

[14] It will be recalled that petitioners, of course, did not participate at the construction permit stage.

030 16

the proper interpretation of this description. Petitioners contend that the Licensing Board violated the stipulation when it ruled, based on the evidence presented to it, that "the OZD is a segmented, branching system of faults and folds and that the assumption of a rupture along its full length is speculative and unreasonably conservative." Licensing Board Decision at 106, J.A. at 563. Respondents and intervenors, on the other hand, argue that this finding is fully consistent with the actual understanding of the parties a decade ago.

Petitioners' reading of the description set forth in the USGS model as contemplating related faults capable of rupturing along the entire length of the zone is entirely understandable, particularly in light of the fact that petitioners are not and do not purport to be trained seismologists. The Licensing Board itself conceded that the USGS' language was "ambiguous [and could] be read to describe the OZD as a single, 'thoroughgoing' fault." *Id.* at 71, J.A. at 545. The most persuasive evidence to clarify the meaning of the USGS model, and consequently the stipulation of the parties, comes from USGS itself. That evidence supports entirely the Licensing Board's interpretation. USGS witness James F. Devine testified at the licensing hearing:

> [The USGS model] specifically avoided the term "fault zone." We called it a zone of deformation because there are indeed segments which are not faulted, but instead deformed, folded, for example.
>
> And so when attempting to describe then the earthquake potential one should assign to such a feature, we argued that the three discrete zones should not represent individual fault zones and earthquake magnitudes dependent on each of those individual segments, but instead should consider them all in one segment, for the purposes of estimating earthquake size.

Licensing Hearing Transcript (Tr.) at 5333, J.A. at 357. When asked whether the USGS model contemplated a

fault "capable of rupturing at the same time in a single event," Mr. Devine responded:

> No. As I recall, *none of us had the opinion or the position that the entire length could rupture at once,* but only that there was indeed some relationship, probably at depth, of these three segments, such that it all should be considered one zone.

Id. (emphasis added).

In sum, the Appeal Board's ruling that the Licensing Board did not violate the stipulation of the parties when it received evidence concerning the geological composition of the OZD is adequately supported by the record. Indeed, it seems curious, to say the least, to suggest that the utility-applicants would have stipulated to the USGS model if it were interpreted in the broad manner petitioners contend, since the net effect of such a stipulation would have been to foreclose almost all seismic issues from the licensing hearing and to doom the utilities' licensing applications to certain failure.[15]

C

At the conclusion of its hearings, the Licensing Board ruled that the seismic design of SONGS Units 2 and 3—based upon a "Safe Shutdown Earthquake" of a magnitude of 7 (on the Richter scale) and a maximum vibratory ground motion of .67g—was adequate to protect the public health and safety. This ruling was upheld by the Appeal Board, and was relied upon by the NRC itself in issuing the operating licenses for the San Onofre facili-

---

[15] As petitioners' brief explains, a fault rupture of 240 km, the entire length of the OZD, would be occasioned by an earthquake of a magnitude of M, 7.87. *See* Pet. Brief at 38 (quoting testimony of Dr. James Brune). That the Licensing Board would issue a construction permit on a plant designed to withstand an earthquake of just over 1/10th the magnitude of the earthquake hypothesized under the model allegedly stipulated to by the parties defies reason.

0 0 0 1 1 3

ties. Petitioners challenge these findings on the ground that they are not supported by substantial evidence. Petitioners' arguments focus on such a limited portion of the evidence presented in this case that, even were we to accept their specific contentions, we would have no difficulty in concluding that the NRC's findings are supported by substantial evidence. Petitioners point to the testimony of only 3 of the 28 witnesses who testified before the Licensing Board during 25 days of hearings. They emphasize only a miniscule fraction of the 7,000 pages of hearing transcript. More fundamentally, however, they ignore the Appeal Board's express finding that even excluding the testimony assailed by petitioners, "[t]he choice of a M. 7.0 safe shutdown earthquake for San Onofre is amply supported by *other expert testimony* in the record," particularly the testimony of Drs. Smith and Ehlig. Appeal Board Decision at 709 n.40, J.A. at 631 (emphasis added).

First, petitioners attack the testimony of Dr. David Slemmons, a witness for the utility-applicants, with respect to the appropriate magnitude for the "Safe Shutdown Earthquake." Petitioners contend that the magnitude arrived at by Dr. Slemmons through his study is a mean, or average, value and therefore cannot be considered "conservative" as a matter of law. They vigorously contend that the standard should in fact be the mean value plus one standard deviation. Application of the standard advanced by petitioners would result in a "Safe Shutdown Earthquake" of M. 7.8. *See* Pet. Brief at 44.

Acceptance of a *mean value* as an appropriately "conservative" measure of adequate safeguards for the public health and safety in this critical area seems, at first blush, to be lacking in stringency. But upon analysis, we conclude that the NRC's reliance on the Slemmons study was entirely reasonable and that its ultimate findings were supported by substantial evidence. The Commission has adequately explained the "conservative" assumptions

0000119

inherent in Dr. Slemmons' model, *see* Licensing Board Decision at 121-22, J.A. at 570-71, and, as noted above, his findings are corroborated by other expert testimony. Specifically, the NRC found that the underlying data base utilized by Dr. Slemmons was "already overly conservative":

> Dr Slemmons used only *the largest percentage rupture reported for each fault to obtain the average rupture length*, which also adds conservatism to his estimate.

Id. (emphasis added).[16]

Petitioners' specific claim that Dr. Slemmons repudiated the methodology of his study upon cross-examination and adopted petitioners' mathematical expression of "conservatism" is utterly without merit. An examination of Dr. Slemmons' entire testimony reveals at least three occasions when the witness expressly rejected the measure of "conservatism" proffered by petitioners' counsel. *See* Tr. at 6230-31, J.A. at 375-76; Tr. at 6265-69, J.A. at 381-85; Tr. at 6272, J.A. at 388.

Second, petitioners challenge the Licensing Board's discounting of the testimony of two other expert witnesses, Drs. Boore and Luco. In each case the Board simply concluded, as was its province to do, *see Universal Camera Corp. v. National Labor Relations Board*, *supra*, 340 U.S. at 495-97; *Penasquitos Village, Inc. v. National Labor Relations Board*, *supra*, 565 F.2d at 1076-80, that their testimony was not as credible as other testimony or was outweighed by other evidence. Petitioners cannot be heard to challenge the Commission's findings as unsupported by substantial evidence merely

[16] The Commission further noted that Dr. Slemmons could have lowered the mean value of averaging the percentage rupture of only those faults of less than 400 km length. He did not, however, do so, thereby further increasing the "conservatism" of the data base.

0020

by pointing to the evidence against the NRC's ruling, while ignoring the substantial evidence in its support.

Petitioners' Reply Brief indirectly addresses this defect in their argument. *See* Pet. Reply Brief at 21-26. The gist of petitioners' argument in this respect appears to be that the uncertainty of the science of seismology, coupled with the regulatory requirement that the inquiries be conducted in a "conservative manner," counsels the judiciary to require the NRC to accept the worst prediction of earthquake potential proffered to it, regardless of its perceptions of the relative credibility of the testimony.

In advancing this argument, petitioners fundamentally misperceive the judiciary's role in complex regulatory matters. The uncertainty of the science of earthquake prediction only serves to emphasize the limitations of judicial review and the need for greater deference to policymaking entities. This is no startling or novel development. Just last year the Supreme Court in an analogous context observed that "[a] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, supra,* —— U.S. at ——, 103 S.Ct. at 2256.[17]

---

[17] *See also FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972) ("A court must be reluctant to reverse results supported by such a weight of considered and carefully articulated expert opinion. Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on 'engineering and scientific' considerations, we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact.").

0030321

In addition, the courts have long accepted the Commission's definition of its statutory mandate to "provide adequate protection to the health and safety of the public" as requiring not a risk-free environment, but a "reasonable assurance . . . that the reactor could be safely operated at the proposed location." *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 414 (1961). *See also North Anna Environmental Coalition v. Nuclear Regulatory Commission*, 533 F.2d 655, 665-67 (D.C. Cir. 1976); *Nader v. Nuclear Regulatory Commission*, 513 F.2d 1045, 1052 (D.C. Cir. 1975). These cases are fundamentally at odds with petitioners' argument that uncertainty, coupled with the mandate of "conservatism," requires the NRC to adopt wholesale the worst case scenario that a party may gloomily frame. Indeed, petitioners' arguments when extended to their logical conclusion would suggest that, as a matter of law, no conservatively acceptable level of earthquake risk exists. *See* Reply Brief at 24-25 ("It is clear that, with the burden of proof to show that the design basis earthquake ground motion could not be exceeded, the burden could not be scientifically held, given our present lack of knowledge") (quoting written testimony of Dr. James Brune). After examining the entire record, both the evidence for and against the Commission's findings, we find those findings amply supported by substantial evidence.

D

Petitioners also argue that the Licensing Board committed prejudicial error when it admitted into evidence the multi-volume Final Safety Analysis Report (FSAR) prepared by Southern California Edison with respect to the SONGS Units. NRC regulations require applicants for operating licenses to prepare a FSAR. *See* 10 C.F.R. § 50.34(b) (1983). Under Commission precedent, the FSAR may be admitted into evidence at the licensing

000122

hearing in order to prove compliance with this regulatory requirement. *See Arkansas Power & Light Co. (Arkansas Nuclear One Unit 2)*, 6 A.E.C. 25, 32 (1973). However, in this case, the Licensing Board admitted the FSAR into evidence for the truth of all the matters asserted therein. Petitioners argued before the Appeals Board that the FSAR, as unauthenticated hearsay, was improperly admitted and that petitioners were prejudiced in their ability to conduct cross-examination because of the applicants' failure to identify the authors of the specific sections of the report. The Appeal Board agreed with petitioners, finding that the Licensing Board had erred in admitting the FSAR for any purpose save that of demonstrating compliance with the regulatory scheme. Appeal Board Stay Decision at 366-68, J.A. at 647-48. However, the Appeal Board ruled that this evidentiary error was harmless inasmuch as only limited reliance had been placed by the Board on the FSAR. *See id.* at 365 n.31, J.A. 646 ("the Licensing Board mentions the FSAR only twice in its seismic decision and cites independent authority for the same conclusions").

Petitioners challenge this finding of nonprejudical error. Specifically, petitioners argue that, since it is impossible to determine the actual extent to which the Board relied on the FSAR, prejudice should be presumed because "[t]he absence [thereof] does not affirmatively appear." Pet. Brief at 57. Petitioners' description of the burdens of proof is, however, quite in error; the onus is squarely upon them to establish prejudice. In *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453 (D.C. Cir. 1967), this court noted:

> A court will not reject an agency finding that is supported by substantial evidence merely because the agency also incidentially mentions incompetent or irrelevant material. Thus, in dealing with an agency's "official notice," in an incidental or verifying reference, of matter outside the record, the

> courts do not "make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings . . . unless substantial prejudice is shown to result."

Id. at 466 (quoting *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 530 (1946)). *See also Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission*, 606 F.2d 323, 328-29 (D.C. 1979), *cert. denied*, 444 U.S. 1073 (1980); *National Labor Relations Board v. Seine & Line Fishermen's Union of San Pedro*, 374 F.2d 974, 981 (D.C. Cir.), *cert. denied*, 389 U.S. 913 (1967). As noted above, the NRC's findings are amply supported by substantial evidence, other than the FSAR. The Appeal Board properly ruled that the Licensing Board's erroneous admission of the FSAR constituted harmless error.

E

Equally unpersuasive is petitioners' penultimate argument—that the NRC's failure to provide a quantifiable definition for the key regulatory phrase, "conservative manner," *see* 10 C.F.R. Part 100, App. A § V(a)(1)(iv) (1983), renders all of its licensing decisions arbitrary and capricious. We find the Commission's approach entirely reasonable, notwithstanding the absence of a specific definition of the word "conservative," especially in light of the broad policymaking authority conferred by Congress on the agency. Many of the investigations prescribed in the regulations, and most of the infinite number of judgment calls required in conducting those investigations, are not mathematically expressable and, therefore, do not lend themselves to rigid statistical definitions. Certainly, the quantifiable "mean plus one standard deviation" definition propounded by petitioners is not the only reasonable option the Commission could arrive at in exercising its delegated authority.

More fundamentally, the Commission has adequately enumerated the "conservative" assumptions inherent in

00124

the methodologies of the studies upon which it relied. Its proceedings have been exhaustive, and the record generated thereby contains substantial evidence in support of each of the NRC's conclusions. "We see no reason why we should not accord to the Commission's interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision." *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961).

F

Petitioners' final area of argument consists of several contentions aimed at setting aside the NRC's licensing decision because of alleged unfairness infecting the entire hearing process. A dispassionate review of the record simply lends no support whatever to petitioners' claims; rather, the record persuasively shows that petitioners were afforded a full and fair opportunity to participate before the Commission. It cannot be said that "the entire hearing was permeated by . . . pervasive impatience—if not hostility— . . . which made fair and impartial consideration impossible." *Office of Communication of the United Church of Christ v. Federal Communications Commission*, 425 F.2d 543, 548 (D.C. Cir. 1969). This is simply not a case such as *United Church of Christ* where the agency's "entire handling of [the] case," *id.* at 550, is brought into doubt because of indications of agency bias and prejudicial error. The NRC has not taken action inconsistent with its prior findings. *Id.* at 545-46. It did not erroneously allocate the burden of proof. *Id.* at 548-49. Indeed, all the actions taken here are well within the Commission's authority to control its own proceedings. *See* 10 C.F.R. § 2.718 (1983).

In their opening broadside against the Commission's procedures followed here, petitioners vigorously contend that, by virtue of an NRC general directive to expedite

licensing proceedings, petitioners were not given adequate time to prepare their case, thereby depriving them of a fair hearing. Specifically, petitioners contend that the Licensing Board imposed "a truly impossible schedule, thereby making it as difficult as possible for petitioners to present such a truly massive case in a manner best suited to protect the public health and safety." Petitioners' Brief at 16.

This claim, upon analysis, must fail. Dispassionately considered, the record utterly fails to support as a factual matter the contention that the schedule was "impossible." This case was not rushed to hearing in 1981 out of the blue. To the contrary, petitioners were permitted to intervene in 1977, and their contention with respect to the adequacy of the SONGS Units' seismic design was formally established in January 1978, over three years before the hearings began. The Licensing Board order directing that discovery be completed by February 1981 was entered in August 1980. It was almost a year after entry of that order before the hearings began in June 1981. This schedule, notwithstanding the preparation demands imposed on all parties in the spring of 1981, is not asserted to violate any statutory or regulatory requirement.

Petitioners do mount a more specific argument that the NRC's regulations were violated, independent of the Commission's general direction to expedite licensing proceedings. They contend that they were wrongfully required to participate in a prehearing conference prior to the completion of discovery, allegedly in violation of 10 C.F.R. § 2.752.[18] This argument is patently frivolous.

---

[18] The relevant portion of § 2.752 reads:

> The Commission or the presiding officer may, and in the case of a proceeding on an application for a construction permit or an operating license for a facility of a type described in §§ 50.21 (b) or 50.22 of this chapter or a testing

0126

Petitioners omit from their citation of this regulation the critical language "or such other time as the Commission or the presiding officer may specify." 10 C.F.R. § 2.752(a) (1983). The NRC reasonably expedited these proceedings, consistent with the public interest, without unduly implicating the demands of fairness. The Commission's deliberations over SONGS Units 2 and 3 spanned nearly ten years. Petitioners were permitted to intervene in the agency's proceedings over 3½ years before the licensing hearing was held. The relevant seismic design issues were well-known throughout that period. The long history of the NRC's proceedings in this case evidences deliberate decisionmaking, not hurried rubber-stamping of prior tentative decisions. That petitioners may have been understaffed in comparison to the applicants, and thereby have sustained a comparative disadvantage, cannot and does not affect our examination of the reasonableness of the Commission's actions. We are quite unable to conclude that the timing of the proceedings deprived petitioners of a fair hearing or rendered the Commission's actions arbitrary and capricious.

Nor can we conclude that the Commission committed reversible error when it required petitioners to examine one of their witnesses a day earlier than they had planned. Indeed, the witness was put on the stand during the very afternoon preceding the day on which the petitioners had planned. The suggestion that the acceleration of a single witness' appearance in a long and

---

> facility, shall direct the parties or their counsel to appear at a specified time and place for a [prehearing] conference .... A prehearing conference held under this section in a proceeding involving a construction permit of operating license shall be held within sixty (60) days after discovery has been completed, or such other time as the Commission or the presiding officer may specify.

10 C.F.R. § 2.752(a) (1983).

000127

protracted hearing evinces agency bias and hostility is simply too extravagant a claim to be seriously maintained.

Finally, petitioners make the imaginative, but ludicrous argument that the NRC is biased as a matter of law and must accordingly be disqualified from presiding over the proceedings relating to the issuance of an operating license because of the Commission's alleged potential liability to the nuclear applicants were it to reverse its prior seismic design decision. Even assuming *arguendo* the extraordinary proposition that the NRC could be held liable,[19] petitioners' disqualification suggestion is specious. The Atomic Energy Act, as we have seen, establishes a two-step licensing process—the construction permit phase and the operating license phase. Under the logic of petitioners' analysis, the NRC would always be disqualified from rendering decisions in the licensing phase because of prior decisions in the construction phase. Such a result is fundamentally at odds with the statute and common sense. Congress has not seen fit to designate an alternative decisionmaker to conduct licensing proceedings once the NRC has determined to issue a construction permit. That decision must be made

---

[19] The district court case cited by petitioners in support of their contention that the NRC may be held liable, *General Public Utilities Corp. v. United States*, 551 F. Supp. 521 (E.D. Pa. 1982), is—assuming its holding to be correct—inapposite. That case involved the duty of the NRC to "monitor nuclear experiences and to disseminate appropriate warnings," *id.* at 526, not any potential liability for licensing decisions themselves or the discretionary judgments made therein. The respective duties are fundamentally dissimilar. The explicit duty to warn discussed in *General Public Utilities* clearly inures to the benefit of the utility, while the Commission's duty to make the seismic design decisions involved in this case is directed to the public in general. The issuance of warnings involves little if any exercise of discretion, while the decision to issue a license involves the exercise of judgment in the midst of uncertainty.

0028

by Congress' delegatee—the NRC. It cannot be made by the courts.

Moreover, the premise of petitioners' argument—that recipients of construction permits are entitled to rely on NRC findings at the construction permit hearing—has expressly been rejected by the Supreme Court. *See Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, supra*, 367 U.S. at 415 (applicant on notice "that it proceeds with construction at its own risk, and that all its funds may go for naught"). The regulations do provide a mechanism whereby an applicant may obtain Commission approval of the safety of any particular design feature at the construction permit stage, *see* 10 C.F.R. § 50.35(b) (1983); however, the applicants in this case sought no such approval.

An examination of the entire record in this case demonstrates that petitioners were given a full and fair opportunity to present their arguments before the Commission, and that the Commission has fully complied with the procedures mandated in the applicable statutes and regulations. The orders of the Commission are therefore

Affirmed.

JJ0 J29

No. 84-1442

Office-Supreme Court, U.S.
FILED
MAY 9 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

AUGUST S. CARSTENS, FRIENDS OF THE EARTH, PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

HERZEL H.E. PLAINE
General Counsel

WILLIAM H. BRIGGS, JR.
Solicitor

SHELDON L. TRUBATCH
Senior Attorney
Nuclear Regulatory Commission
Washington, D.C. 20555

QUESTION PRESENTED

Whether the court of appeals correctly concluded (1) that substantial evidence supported the Nuclear Regulatory Commission's determination that the seismic design basis of the San Onofre Nuclear Generating Station, Units 2 and 3, was adequate to warrant the issuance of operating licenses for the facility; and (2) that the Commission had acted well within its discretion in making certain procedural rulings during the licensing hearing.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 7

TABLE OF AUTHORITIES

Case:

Baltimore Gas & Electric Co. v. *NRDC*, 462 U.S. 87 5

Regulations:

10 C.F.R. :

Pt. 2:

Section 2.206 5

Section 2.752 ..... 3, 4, 7

Pt. 100, App. A para. IV(a)(7) 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1442

AUGUST S. CARSTENS, FRIENDS OF THE EARTH, PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 742 F.2d 1546.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1984, and a petition for rehearing was denied on November 7, 1984. The petition for a writ of certiorari was filed on February 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After a full adjudicatory hearing in which petitioners participated, an Atomic Safety and Licensing Board (Licensing Board) of the Nuclear Regulatory Commission determined that the seismic design basis for Southern California Edison Company's San Onofre Nuclear Generating Station, Units 2 and 3, provides a reasonable assurance of

safety against earthquake hazards. Pet. Supp. App. 46-183. The Licensing Board, relying on testimony by several experts, found that an offshore, linked series of zones of deformations and faults known collectively as the Offshore Zone of Deformation (OZD) was the controlling geologic feature in this case. *Id.* at 68-69, 90-94. The Licensing Board rejected petitioners' unsupported claim that the OZD should be considered as a continuous or throughgoing fault capable of a rupture along its entire length of approximately 240 kilometers. *Id.* at 94. The Board further found that substantial evidence in the record supported the finding that postulation of an earthquake of magnitude 7 occurring on the OZD provided an adequate basis for the seismic design of the San Onofre facility. *Id.* at 105-108.

The Licensing Board also considered petitioners' claim that another nearby earthquake fault, the Cristianitos fault, was "capable."[1] After hearing the testimony proffered by petitioners on that issue, the Board ordered it stricken from the record. The Board concluded that the evidence lacked any probative value, "based upon the witness' sketchy qualifications as an expert, the superficiality and questionable accuracy of his pre-filed evidence, and his demeanor upon cross-examination." Pet. Supp. App. 61. In the alternative, the Licensing Board held that adjudication of the issue of the capability of the Christianitos fault was "foreclosed" to the extent the contention relied on pre-1973 evidence because that issue had been studied extensively during the 1973 construction permit proceeding for San Onofre. *Id.* at 63-67. Thus, the Board limited adjudication of the capability issue to post-1973 seismic events. The Licensing Board took evidence on the question whether the Cristianitos fault

---

[1]The NRC's regulation defining "capable" faults (10 C.F.R. Pt. 100, App. A para. IV(a)(7)) is set out in the court of appeals' opinion at Pet. App. 7.

was associated with earthquakes in 1975 and 1977 and determined, based on uncontradicted expert witness testimony in the record, that those earthquakes were unrelated to the Cristianitos fault. *Id.* at 166-167.

Petitioners sought a stay from the Commission's Atomic Safety and Licensing Appeal Board (Appeal Board). The Appeal Board denied the stay and affirmed the Licensing Board in all respects save the Licensing Board's alternative holding that adjudication of the capability of the Cristianitos fault was "foreclosed" by its consideration in the 1973 proceeding. Pet. Supp. App. 184-210. But the Appeal Board concluded that this error was not prejudicial because it had neither precluded petitioners from presenting their entire direct case nor from cross-examining the applicant's witnesses on pre-1973 seismic activity. *Id.* at 193.

2. After unsuccessfully exhausting their remaining administrative remedies, petitioners sought review in the court of appeals. They contended that the Licensing Board had committed prejudical error by foreclosing their attempt to adjudicate the capability of the Cristianitos fault, that the Licensing Board had wrongly redecided the segmented nature of the OZD, that the choice of maximum design earthquake was not supported by substantial evidence, and that the Licensing Board had committed several procedural errors, especially in its interpretation of the Commission's regulation governing the timing of pre-hearing conferences (10 C.F.R. 2.752). The court of appeals rejected all of petitioners' contentions (Pet. App. 1-29).

The court of appeals first concluded that the Licensing Board had not "foreclosed" consideration of the capability of the Cristianitos fault. Rather, after having heard all of petitioners' proffered evidence on the issue, the Board acted well within its discretion in striking that evidence as nonprobative. Pet. App. 13-15. The court also held that the

Licensing Board had not improperly "redecided" the discontinuous nature of the OZD. Instead, the court agreed that the record showed that the Licensing Board had properly interpreted a stipulation by the parties to the earlier construction permit proceeding regarding the non-continuous nature of the OZD. *Id.* at 16-18. The court of appeals next affirmed the Licensing Board's finding that testimony by several experts provided substantial evidence in the record supporting the choice of a magnitude 7 earthquake as the appropriate design basis for San Onofre. *Id.* at 19. Finally, the court found no merit to petitioners' allegations of alleged unfairness by the NRC. *Id.* at 25. In particular, the court found "patently frivolous" petitioners' challenge to the NRC's regulation on the timing of pre-hearing conferences (10 C.F.R. 2.752), noting that petitioners had omitted from their citation of the regulation critical language providing the Licensing Board with discretion to set the time of a pre-hearing conference. Pet. App. 26-27.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Far from abdicating its responsibility to take a hard look at the NRC's decision, the court of appeals, in a comprehensive decision, explained in detail why the record of the agency proceedings supported the NRC's grant of an operating license for San Onofre and did not support any of petitioners' allegations.[2] On the other hand, to the extent

---

[2]There is no merit to petitioners' suggestion (Pet. 38) that the record contains a combination of "danger signals" indicating that the NRC had not taken a hard look at the salient problems. The "danger signals" enumerated by petitioners are simply their allegations of error, all of which were rejected by the court of appeals.

that petitioners challenged the scientific and technological basis underlying the seismic design of San Onofre, the court of appeals correctly followed this Court's recent teaching that courts must be at their most deferential when reviewing technical determinations that are both at the frontiers of science and within the Commission's area of special expertise. *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87, 103 (1983). See Pet. App. 21.

Petitioners do not challenge the court of appeals' characterization of the seismic design of a nuclear power plant as a technical determination at the frontiers of science (Pet. App. 21). Instead, in an attempt to avoid the effect of this Court's decision in *Baltimore Gas & Electric Co.*, they contend that the NRC, after reviewing the seismic design for over 80 operating nuclear power reactors, still has no expertise in this area. See, *e.g.*, Pet. 28-30. The argument is patently frivolous, and, in any event, it fails to explain on what basis the courts could reasonably second-guess the agency established by Congress for the express purpose of deciding these difficult issues.[3]

2. As for alleged irregularities in the proceedings before the NRC, petitioners basically repeat the arguments they made below and contend that the court of appeals erred by not ruling in their favor. These issues involve narrow disputes concerning interpretation of the NRC's procedural regulations, differences of opinion over the meaning of earlier NRC decisions in this proceeding, and challenges to

---

[3]Petitioners also suggest (Pet. 47) that *Baltimore Gas & Electric Co.*'s principle of deference is limited to agency decisions intended to have a limited life and involving uncertainty in only one aspect of a comprehensive decision. Even if *Baltimore Gas & Electric Co.* were so limited, it would still apply to this case. A determination of seismic design is always open to reconsideration based on new information. 10 C.F.R. 2.206. And uncertainty in the ground motion due to earthquakes is only one element in the consideration of seismic design, which in turn is only one element in the overall design of a nuclear plant.

the NRC's discretion to determine the competence of expert witnesses. All of petitioners' challenges were correctly decided by the court of appeals in accordance with well-established principles of law and do not present any issues warranting this Court's review.

For example, petitioners erroneously contend that the court of appeals sanctioned the NRC's alleged failure to determine whether the Cristianitos fault was capable of earthquake activity. The court of appeals explicitly dismissed petitioners' claim that they had been "foreclosed" from adjudicating the issue, finding instead that petitioners' evidence had been admitted and then struck as lacking in probative value. Pet. App. 13. The court reviewed the NRC's reasons for striking the testimony and properly found that the NRC had exercised its discretion reasonably. *Id.* at 13-15. Moreover, the court found, contrary to petitioners' allegations, that the record contains uncontested evidence, including determinations by the NRC staff, that the Cristianitos fault has been inactive for over 125,000 years. *Id.* at 15.[4]

Petitioners also are incorrect in their contention (Pet. 51-52) that the court of appeals did not understand the meaning of the evidence regarding the segmented character of the OZD. The court of appeals thoroughly considered the issue and explained that the record testimony of an expert from the United States Geologic Survey fully supported the NRC's interpretation of earlier USGS testimony on the OZD. Pet. App. 16-18.

---

[4]It is this finding of capability *by the NRC staff* that is required by the regulations that petitioners reference (Pet. 36-37, 49-50). The regulations do not require such a finding by a Licensing Board.

Finally, there is no merit to petitioners' contention that the court of appeals erred in affirming the Commission's interpretation of its rule on the timing of pre-hearing conferences. 10 C.F.R. 2.752. Petitioners' repetition of the argument they advanced below (Pet. 61-64) fails to address the court of appeals' observation (Pet. App. 26-27) that petitioners omitted part of the regulation in attempting to interpret it to their own liking.

In sum, the court of appeals correctly concluded that "[a]n examination of the entire record in this case demonstrates that petitioners were given a full and fair opportunity to present their arguments before the Commission, and that the Commission has fully complied with the procedures mandated in the applicable statutes and regulations." Pet. App. 29. Petitioners have advanced no basis for doubting that conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

HERZEL H.E. PLAINE
General Counsel

WILLIAM H. BRIGGS, JR.
Solicitor

SHELDON L. TRUBATCH
Senior Attorney
Nuclear Regulatory Commission

MAY 1985

DOJ-1985-05

FILED
MAY 13 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1462

IN THE

Supreme Court of the United States

October Term, 1984

AUGUST S. CARSTENS, FRIENDS OF THE EARTH,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA,
Respondents,

SOUTHERN CALIFORNIA EDISON COMPANY, ET AL.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION

CHARLES R. KOCHER
JAMES A. BEOLETTO
SOUTHERN CALIFORNIA EDISON COMPANY
2244 Walnut Grove Avenue
Rosemead, California 91770
Telephone: (818) 302-1212
Attorneys for Intervenor Southern California Edison Company

DAVID R. PIGOTT
(Counsel of Record)
SAMUEL B. CASEY
RONALD G. ARONOVSKY
CATHERINE M. KELLY
ORRICK, HERRINGTON & SUTCLIFFE
600 Montgomery Street
San Francisco, California 94111
Telephone: (415) 392-1122
Attorneys for Intervenors Southern California Edison Company, San Diego Gas & Electric Company, the City of Anaheim, California and the City of Riverside, California

BEST AVAILABLE COPY

31 pp

QUESTION PRESENTED

Should a writ of certiorari be granted to review a decision of the Court of Appeals affirming a licensing decision of the Nuclear Regulatory Commission when

(a) the Court of Appeals applied the long-recognized standard of judicial review for administrative agency decisionmaking required by statute and the decisions of this Court and the Courts of Appeals, i.e., that the agency action was supported by substantial evidence and was neither arbitrary nor capricious;

(b) the Court of Appeals followed the precedents of this Court by according appropriate deference to the special expertise of the Commission in areas of scientific and technical uncertainty;

(c) the Commission complied with all substantive and procedural regulations governing this licensing proceeding; and

(d) the Court of Appeals, after reviewing the administrative record, determined that the Commission's licensing decision was supported by substantial evidence and was neither arbitrary nor capricious?

RULE 28.1 STATEMENT

Southern California Edison Finance Company, N.V., Bear Creek Uranium Company and SCE Capital Company are subsidiaries or affiliates of intervenor Southern California Edison Company. Energy Factors, Inc. is a subsidiary of intervenor San Diego Gas & Electric Company.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
SUMMARY OF ARGUMENT	1
REASONS FOR DENYING THE WRIT	3
I. THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW TO AFFIRM THE DECISION OF THE COMMISSION	3
A. The Standard of Review Articulated And Applied By The Court Of Appeals Is Consistent With Supreme Court And Court Of Appeals Precedent	3
B. The Court Of Appeals Applied The Proper Standard Of Review And Correctly Determined That Substantial Evidence Supported The Commission's Decision	9
II. PETITIONERS' CONTENTION THAT THE COMMISSION IS NOT ENTITLED TO DEFERENCE BECAUSE IT SUPPOSEDLY LACKS THE EXPERTISE TO APPLY ITS OWN REGULATIONS ON POWER PLANT LOCATION IS BOTH UNTIMELY AND WITHOUT MERIT	14
A. Petitioners' "Expertise" Argument Is Untimely.	14
B. The Court of Appeals Properly Deferred To The Expertise Of The Commission	14
III. THE COURT OF APPEALS CORRECTLY PERCEIVED AND APPLIED THE FACTUAL EVIDENCE ON WHICH ITS DECISION IS BASED	16
A. The Court Of Appeals Understood Completely Petitioners' Unfounded Attempt To Raise The Issue Of The Incapability Of The Cristianitos Fault	17
B. Petitioners' Proposed Interpretation Of The Offshore Zone Of Deformation As A Stipulated Continuous Fault Is A Flagrant Misinterpretation Of The Facts	18
C. Petitioners' Interpretation Of Dr. Slemmons' Testimony Is Again Without Merit	19

Page

. . The Court Of Appeals Correctly Reviewed The "Conservatism" Of The Commission's Findings 20
E. Petitioners' Interpretation Of 10 C.F.R. § 2.752 Remains Frivolous 21
F. The Commission's Regulations Do Not Require Litigation Of The Capability Of The Cristianitos Fault 21
G. Petitioners' Statement Of Facts Is Replete With Arguments Previously Denied By The Court Of Appeals 22
1. Petitioners Had Ample Time To Prepare Their Case 22
2. Admission Of The FSAR Was Not Reversible Error 22
3. The Commission Accorded Proper Weight To The Testimony Of Drs. Luco and Boore.. 23
CONCLUSION 24

TABLE OF AUTHORITIES

CASES — PAGE

Adickes v. *S.H. Kress and Company,* 398 U.S. 144 (1970).. 14

Baltimore Gas & Electric Co. v. *Natural Resources Defense Counsel, Inc.,* 462 U.S. 87 (1983) 2, 8, 10, 11, 12, 13

Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281 (1974)..... 4

Cayman Turtle Farm, Ltd. v. *Andrus,* 478 F. Supp. 125 (D.D.C. 1979)..... 6

Citizens to Preserve Overton Park v. *Volpe,* 401 U.S. 402 (1971)..... 4, 11, 17

County of Rockland v. *U.S. Nuclear Regulatory Commission,* 709 F.2d 766 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 485 (1983)..... 4, 7

Environmental Defense Fund, Inc. v. *Environmental Protection Agency,* 489 F.2d 1247 (D.C. Cir. 1973)..... 15

Ethyl Corp. v. *Environmental Protection Agency,* 541 F.2d 1 (D.C. Cir. 1976), *cert. denied,* 426 U.S. 941 (1976)..... 4, 5, 12

Federal Elections Commission v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27 (1981) 4

Federal Power Commission v. *Florida Power & Light Co.,* 404 U.S. 453 (1972)..... 4, 10

Greater Boston Television Corporation v. *F.C.C.,* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1970) 11

G.U.A.R.D v. *Nuclear Regulatory Commission,* 753 F.2d 1144 (D.C. Cir. 1985)..... 11

In the Matter of Southern California Edison Company, et. al., 14 N.R.C. 1091 (1981) 11

Lawn v. *United States,* 355 U.S. 339 (1958) 14

Lead Industries Ass'n. v. *Environmental Protection Agency,* 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980)..... 4, 5, 7, 11

Nader v. *Allegheny Airlines,* 426 U.S. 290 (1976) 16

North Anna Environmental Coalition v. *Nuclear Regulatory Commission,* 533 F.2d 655 (D.C. Cir. 1976)..... 4, 7, 15

Penasquitos Village, Inc. v. *National Labor Relations Board,* 565 F.2d 1074 (9th Cir. 1977)..... 15

Public Citizen v. *Foreman,* 631 F.2d 969 (D.C. Cir. 1980)... 6

CASES — PAGE

Public Service Co. of New Hampshire v. *Nuclear Regulatory Commission*, 582 F.2d 77 (1st Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978) 8

Siegal v. *Atomic Energy Commission*, 400 F.2d 778 (D.C. Cir. 1968) 7, 10

Stamper v. *Secretary of Agriculture*, 722 F.2d 1483 (9th Cir. 1984) 15

State of Maine v. *Kreps*, 563 F.2d 1043 (1st Cir. 1977) 6

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) 7, 9

Westinghouse Electric Corp v. *Nuclear Regulatory Commission*, 598 F.2d 759 (3rd Cir. 1979) 8

Weyerhauser Co. v. *Costle*, 590 F.2d. 1011 (D.C. Cir. 1978) 6, 11, 16

STATUTES

5 U.S.C. § 706 ..... 3, 10, 17

42 U.S.C. § 2339 ..... 3, 22

REGULATIONS

10 C.F.R. § 1.61(b) 15

10 C.F.R. § 2.714(b) 22

10 C.F.R. § 2.752(a) 21

10 C.F.R. Part 100, Appendix A 17, 20

No. 84-1442

IN THE

Supreme Court of the United States

October Term, 1984

AUGUST S. CARSTENS, FRIENDS OF THE EARTH,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA,
Respondents,

SOUTHERN CALIFORNIA EDISON COMPANY, ET. AL.
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION

SUMMARY OF ARGUMENT

This case presents no factual or legal question meriting review by this Court.[1] Petitioners assert that the Court of Appeals abdicated its statutory obligation to review decisions of the Nuclear Regulatory Commission by "blindly deferring" to the Commission in the name of scientific uncertainty. They further contend that the Court of Appeals either misunderstood

[1] A copy of the joint appendix filed with the Court of Appeals is being lodged with the office of the Clerk of this Court concurrent with the filing and service of this brief.

or completely ignored all of petitioners' arguments below. Even a cursory review of the Court of Appeals' opinion and the record in this action, however, reveals that petitioners' claims are wholly without basis in law or fact.

Petitioners first contend that the Court of Appeals established a new and improper standard of judicial review requiring "blind deference" to the Commission in all cases involving scientific or technical uncertainty. Their characterization of the Court of Appeals' opinion is false. To the contrary, the Court of Appeals applied the long-recognized standard of judicial review of agency decisionmaking recently enunciated by this Court in *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983), *i.e.*, a reviewing court must search for substantial evidence in the record supporting agency decisionmaking and ensuring that agency action is neither arbitrary nor capricious, but nevertheless must defer to the expertise of an administrative agency. The Court of Appeals followed the admonition of this Court that judicial deference is most warranted in cases involving scientific or technical uncertainty. Petitioner's claim that the Commission is not entitled to deference because members of the initial licensing board were not trained in earthquake sciences is both untimely and patently frivolous. The Court of Appeals, applying the appropriate standard of review, correctly concluded that substantial evidence supported the decision of the Commission.

Petitioners also claim that the Court of Appeals erred because it supposedly misunderstood or elected to ignore each of the evidentiary and procedural questions raised below by petitioners. Once again, a review of the Court of Appeals opinion and the record demonstrates that (a) the Commission complied with all substantive and procedural regulations governing this licensing proceeding, (b) the Court of Appeals addressed—and rejected—each issue raised by petitioners, and (c) the court correctly determined that substantial evidence supported the factual findings of the Commission. In short, the

only real ground for a writ of certiorari offered by petitioners is that they are unhappy with the outcome of this litigation. That is not a basis for review by this Court.[2]

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW TO AFFIRM THE DECISION OF THE COMMISSION

The only question of law presented by petitioners is their contention that the Court of Appeals applied the wrong standard of review when it affirmed the decision of the Nuclear Regulatory Commission. Petitioners' claim, however, is wholly without merit. To the contrary, the Court of Appeals applied a standard of review consistent with the standards set forth by this Court, the District of Columbia Circuit and other Courts of Appeals for review of administrative agency decisions—especially those involving highly technical questions such as those raised in this action.

A. The Standard Of Review Articulated And Applied By The Court Of Appeals Is Consistent With Supreme Court And Court Of Appeals Precedent

The scope of judicial review of decisions rendered by the Commission is limited by statute to whether the Commission's decision is supported by substantial evidence, and whether it is arbitrary and capricious or otherwise without basis in law. 42 U.S.C. § 2339; 5 U.S.C. § 706. The restrictions and obligations of reviewing courts under this standard are well-settled.

---

[2] Petitioners' statement of the case includes several representations concerning the procedural history of this litigation which have been taken out of context and thus fail to fully describe the proceedings below. These matters include the continuity of intervenors in the construction and licensing proceedings before the Commission, the four years (and not ten months as suggested by petitioners) for discovery allowed petitioners by the Commission and the determination by the original intervenors at the construction permit stage in 1973 that the incapability of the Cristianitos Fault did not merit adjudication. In the interest of clarity and brevity, however, these matters will be addressed in Section III, *infra*.

This Court recognizes that the standard of judicial review under the Administrative Procedure Act "is a narrow one" which presumes agency action to be valid. *Citizens To Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 415-16 (1971); *accord, County of Rockland* v. *U.S. Nuclear Regulatory Commission,* 709 F.2d 766, 776 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 485 (1983) ("the courts have cautioned that the [A.P.A.] Section 10(e) standard of review is 'narrow.' "); *Lead Industries Ass'n* v. *Environmental Protection Agency,* 647 F.2d 1130, 1145 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980) ("the 'arbitrary and capricious' standard of review is highly deferential and presumes agency action to be valid"). This standard of review "forbids the court's substituting its judgment for that of the agency," *Ethyl Corp.* v. *Environmental Protection Agency,* 541 F.2d 1, 34 (D.C. Cir. 1976), *cert. denied,* 426 U.S. 941 (1976), and requires affirmance if there is a rational basis for the agency's decision. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 290 (1974); *Ethyl Corp., supra,* 541 F.2d at 34.

A reviewing court is to be deferential to agency decisionmaking when an agency has been delegated discretion by Congress to apply and interpret the statutes and regulations it administers. *See Federal Elections Commission* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 37 (1981); *North Anna Environmental Coalition* v. *Nuclear Regulatory Commission,* 533 F.2d 655, 659 (D.C. Cir. 1976).

It is beyond dispute that an agency is owed particular deference by a reviewing court when the subject of agency decisionmaking involves scientific or technical questions within the expertise of the agency. As this Court recognized in *F.P.C.* v. *Florida Power & Light Co.,* 404 U.S. 453, 463 (1972), affirming a Federal Power Commission determination based on scientific testing that a power company generated energy that was transmitted in interstate commerce,

> [a] court must be reluctant to reverse results supported by such a weight of considered and carefully articulated expert opinion. Particularly *when we consider a purely factual question within the area of competence of an*

> *administrative agency created by Congress,* and when resolution of that question depends on 'engineering and scientific' considerations, *we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact.* [emphasis added].

Although a reviewing court must delve into the record underlying scientific or technical questions, the courts have recognized that

> it is appropriate to sound some notes of caution about the limits of this exercise. First, we would be less than candid if we failed to acknowledge that we approach the task of examining some of the complex scientific issues presented in cases of this sort with some diffidence. More important, we stress that our review of the evidence is not designed to enable us to second-guess the Agency's expert decisionmaker [citation omitted]. *Congress has entrusted the Agency [E.P.A.] with the responsibility for making these scientific and other judgments, and we must respect both Congress' decision and the Agency's ability to rely on the expertise that it develops.* [emphasis added].

Lead Industries Association v. *Environmental Protection Agency,* 647 F.2d 1130, 1146 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980). As the court observed in *Ethyl Corp.* v. *Environmental Protection Agency,* 541 F.2d 1 (D.C. Cir. 1976), *cert. denied,* 426 U.S. 941 (1976), the courts must respect the limits of their institutional competence and the expertise of administrative agencies:

> After our careful study of the record, we must take a step back from the agency decision. We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.

541 F.2d at 36. *Accord, Public Citizen* v. *Foreman,* 631 F.2d 969, 975 (D.C. Cir. 1980) ("deference is especially prudent in areas involving scientific and medical controversies"); *Weyerhauser Co.* v. *Costle,* 590 F.2d 1011, 1026-27 (D.C. Cir. 1978); *State of Maine* v. *Kreps,* 563 F.2d 1043, 1050 (1st Cir. 1977) ("Where Congress has vested the authority to resolve technical questions of fact in a specialized administrative body with experience and expertise in that field, considerable deference is due its conclusions."); *Cayman Turtle Farm, Ltd.* v. *Andrus,* 478 F. Supp. 125, 131 (D.D.C. 1979) ("A reviewing Court is to be particularly deferential where an agency has been delegated discretion to reach decisions based upon technical and scientific data.").

Similarly, in *Weyerhauser Co.* v. *Costle,* 590 F.2d 1011 (D.C. Cir. 1978), the Court of Appeals upheld with one exception Environmental Protection Agency pulp and paper-mill effluent discharge limitations, recognizing that

> [i]n light of the structure and aims of the [Environmental Protection] Act and the breadth of authority delegated by it to the EPA to identify highly sophisticated control technology *in an area fraught with scientific uncertainty, our review function encounters significant limitations* in the substantive aspect where the given statutory standards are 'arbitrary,' 'capricious,' or 'abuse of discretion.' [emphasis added].

590 F.2d at 1025. The court noted that there are "obvious limitations upon the capacity of courts to deal meaningfully with arcane areas of knowledge of this kind," 590 F.2d at 1026. The court concluded that

> [i]ndeed, the mere fact that the counsel on both sides in this suit could draw upon the opinions of diverse experts sitting virtually at their elbows during preparation of their briefs, while we are forced to decide between their resulting arguments on the basis of our 'generalist' judicial backgrounds, argues for restraint on our part.

Id. Accord, Lead Industries Ass'n v. *Environmental Protection Agency,* 647 F.2d 1130, 1147 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980) (E.P.A. ambient air quality standards for lead affirmed, with court recognizing need for deference on questions "at the very 'frontiers of scientific knowledge' " that by necessity require decisions resting "largely on policy judgments.").

Above all, it is clear that the rule of substantial deference is applicable to judicial review of decisions by the Nuclear Regulatory Commission. As the court observed in *North Anna Environmental Coalition* v. *Nuclear Regulatory Commission,* 533 F.2d 655, 658 (D.C. Cir. 1976),

> This petition for review raises issues of first impression regarding *the siting of a nuclear power reactor on a fault zone.* In doing so it presents for review actions of *an agency whose "regulatory scheme . . . is virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." Siegal* v. *Atomic Energy Commission,* 130 U.S. App. D.C. 307, 312, 400 F.2d 778, 783 (1968). [emphasis added].

The court affirmed the Commission's ruling that the proposed reactor location was consistent with public health and safety. *Id.*[3]

---

[3] The Courts of Appeals in other circuits also have recognized the unique breadth of discretion delegated by Congress to the Commission that necessarily limits the scope of judicial review of Commission decisions. In *County of Rockland* v. *U.S. Nuclear Regulatory Commission,* 709 F.2d 766 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 485 (1983), for example, the Second Circuit recognized the special need for deference to the Commission when it affirmed a Commission decision against taking enforcement action concerning deficiencies in offsite emergency preparedness. The court recognized that

> Congress has given the Commission considerable latitude to decide the difficult questions that arise with respect to nuclear safety. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U.S. 519, 543, 558, 98 S. Ct. 1197, 1219, 55 L.Ed. 2d 460 (1978). We will not unduly circumscribe that latitude by placing unwarranted restrictions on the agency review process.

709 F.2d at 776. The court concluded that "our review is deferential because the Commission and its staff have special expertise and a wide range of

This Court recently reaffirmed these fundamental principles of judicial review of Nuclear Regulatory Commission decisions in *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Counsel, Inc.*, 462 U.S. 87 (1983). In *Baltimore Gas*, the Nuclear Regulatory Commission decided that nuclear power plant licensing boards should assume, for purposes of the National Environmental Policy Act, that the permanent storage of certain nuclear wastes would have no significant environmental impact and thus should not affect the decision whether to license a particular nuclear power plant. The Court of Appeals vacated and remanded these rules on the ground, *inter alia*, that the "zero-release" of nuclear waste assumption made by the Commission prevented the uncertainties surrounding that assumption from affecting individual licensing decisions.

This Court reversed the Court of Appeals. The Court emphasized the limited role of a reviewing court in passing upon Commission action:

> We are acutely aware that the extent to which this Nation should rely on nuclear power as a source of energy is an important and sensitive issue. Much of the debate focuses on whether development of nuclear generation facilities should proceed in the face of uncertainties about their long-term effects on the environment. *Resolution of these fundamental policy questions lies, however, with Congress and the agencies to which Congress has delegated authority,* as well as with state legislatures and, ultimately, the populace as a whole. *Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes.* As we emphasized in our earlier encounter with these very proceedings, "administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as

---

experience in nuclear power plant operation and safety." *Id. See also Westinghouse Electric Corp.* v. *Nuclear Regulatory Commission*, 598 F.2d 759, 771-72 (3d Cir. 1979); *Public Service Co. of New Hampshire* v. *Nuclear Regulatory Commission*, 582 F.2d 77, 82 (1st Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978).

> mandated by statute . . . , not simply because the court is unhappy with the result reached." *Vermont Yankee,* 435 U.S. at 558, 98 S.Ct. at 1219. [emphasis add].

462 U.S. at 97. The Court observed that "the role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Id.* at 97-98.

In determining that the Commission's decision was not arbitrary or capricious, the Court placed the zero-release assumption in context by reviewing three factors relevant to the facts before the Court. The Court noted that the assumption was for a limited purpose, was only one element of the overall decision of the Commission, and

> [t]hird, a reviewing court must remember that the Commission *is making predictions, within its area of special expertise, at the frontiers of science.* When examining this kind of scientific determination, as opposed to simple findings of fact, *a reviewing court must generally be at its most deferential.* [emphasis added].

Id. at 103. Upon review of the "impressive" volume of proceedings before the Commission and the Commission's Statement of Consideration which showed that it had "digested this mass of materials and disclosed all substantial risks," *id.* at 99, this Court concluded that "it simply cannot be said that the Commission ignored or failed to disclose the uncertainties surrounding its zero-release assumption." *Id.* at 100.

B. The Court of Appeals Applied The Proper Standard Of Review And Correctly Determined That Substantial Evidence Supported The Commission's Decision

Petitioners base their claim to review by this Court on the contention that the Court of Appeals established a new standard of review in this action that conflicts with prior decisions of this Court and the District of Columbia Circuit. Petition at 32-33. They contend that under the Court of Appeals decision, "all that need be shown for an agency to avoid close judicial scrutiny is that the subject in controversy involves uncertainty in science and technology." Petition at 28. As a result, according

to petitioners, the Court of Appeals "deferred almost blindly to the NRC because the case involved uncertainty in science and technology." Petition at 31.

Nothing in the Court of Appeals opinion lends any support to petitioners' claim that the Court engaged in "blind deference" to the Commission. To the contrary, petitioners' argument blatantly mischaracterizes the Court of Appeals opinion. The opinion clearly demonstrates that the court reviewed the record as to each issue on appeal and determined that substantial evidence supported the Commission on every point. *See, e.g.,* Opinion of the Court of Appeals ("Opinion") at 10-20, 22-23, 26-28. In so doing, the court followed long-standing principles of judicial review of agency decisionmaking.

First, the Court of Appeals applied the statutory standard of review dictated by the Administrative Procedure Act when it determined that the Commission's decision "is supported by substantial evidence, and that its actions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706 (1982)." Opinion at 10.

Second, relying on the direction of this Court in *Baltimore Gas* and its own understanding of the broad discretion delegated to the Commission as expressed in *Siegel,* the Court of Appeals observed that "the Supreme Court has made it crystal clear that our review of NRC licensing decisions is 'limited.' " Opinion at 9-10.

Third, the Court of Appeals observed that when reviewing Commission decisionmaking in the scientifically uncertain area of predicting a safe shutdown earthquake, "it is in these substantive areas that this court's deference to the agency justifiably reaches its zenith." Opinion at 8. The Court of Appeals recognized that "[t]he uncertainty of the science of earthquake prediction only serves to emphasize the limitations of judicial review and the need for greater deference to policy-making entities," adding that, in light of *Baltimore Gas* and *F.P.C.* v. *Florida Power & Light Co.,* 404 U.S. 453 (1972), "[t]his is no startling or novel development." Opinion at 21.

Petitioners' protestation that this somehow constitutes a new and improper standard of review is specious. Their argument flies in the face of *F.P.C.* v. *Florida Power & Light Co.* and

Baltimore Gas, in which this Court emphasized the need for judicial deference in reviewing questions within the scientific or technical expertise of an administrative agency, and ignores *Weyerhauser Co.* v. *Costle,* 590 F.2d 1011 (D.C. Cir. 1978) and *Lead Industries Ass'n* v. *E.P.A.,* 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980), which, along with *Baltimore Gas,* stress the need for heightened judicial deference in reviewing questions of scientific uncertainty.

Petitioners' contention that the Court of Appeals decision is in conflict with Supreme Court and District of Columbia Circuit precedent is equally without merit. First, they claim that because the Court of Appeals did not agree with petitioners that it was prejudicial error for the Licensing Board to "foreclose" consideration of whether the Cristianitos Fault was a capable fault, the court failed to "consider whether the decision was based on a consideration of all relevant factors" as required by *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971). Petition at 34-35. In fact, the Court of Appeals decision did not conflict with *Volpe*—it merely rejected petitioners' claim that any prejudicial error occurred concerning the Cristianitos Fault issue. Opinion at 11-16.

Second, they argue that the Court of Appeals opinion conflicts with *Greater Boston Television Corporation* v. *F.C.C.,* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1970), because they claim the court refused to take a "hard look" at the record in light of nine supposed "danger signals" of unfairness that petitioners contend mirror the one-sided hearing reversed in *Greater Boston.* Petition at 37-40. Once again, petitioners can point to nothing in the record even suggesting that the Court of Appeals refused to take a hard look at the Commission proceedings. In addition, the record demonstrates that the nine supposed danger signals are without any basis in fact. *See* Section III, *infra.*[4]

---

[4] Petitioners suggest that they were treated as hostile opponents by the Licensing Board and the Commission. *See* Petition at 18-19. To the contrary, the Licensing Board ruled in favor of petitioners on several significant issues that required interlocutory guidance from the Commission. *See, e.g., G.U.A.R.D.* v. *Nuclear Regulatory Commission,* 753 F.2d 1144 (D.C. Cir. 1985) (medical services); *In the Matter of Southern California Edison Company et. al.* 14 N.R.C. 1091 (1981) (effect of earthquakes on emergency planning).

Third, they contend that the Court of Appeals opinion conflicts with *Ethyl Corp.* v. *E.P.A.*, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976), which admonishes courts reviewing agency decisionmaking involving technical issues to engage in a substantial inquiry into the facts that is as intensive as the issues are technical, and not merely to "rubber-stamp" the agency decision as correct. Petition at 41-44. The Court of Appeals engaged in precisely the substantial inquiry contemplated by *Ethyl Corp.* A review of the opinion reveals that the court carefully reviewed the record and familiarized itself with the technical issues involved. Moreover, *Ethyl Corp.* makes clear that as a reviewing court conducts its searching review of the facts,

> that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a super-agency that can supplant the agency's expert decisionmaker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors. [citation omitted].

541 F.2d at 36. Petitioner's contention that the Court of Appeals opinion conflicts with *Ethyl Corp.*—because it failed to recite the incantation that a reviewing court must not "rubber-stamp the agency decision as correct," *id.* at 34—ignores the analysis actually applied by the court.

Finally, petitioners argue that the Court of Appeals "misapplied" this Court's decision in *Baltimore Gas.* Petition at 45. They contend that in *Baltimore Gas,* (a) there was "no question" but that the Commission fully described all areas of uncertainty and how they were resolved, (b) this Court did not rule that uncertainty alone required substantial deference to agency decisionmaking, and that instead, (c) this Court "enumerated three factors supporting greater deference" in that case. Petition at 46-47.

It is clear that *Baltimore Gas* is directly applicable to this case and that the Court of Appeals properly analyzed this Court's opinion. As discussed in greater detail below, the Commission identified and reviewed in painstaking detail the areas of uncertainty and how they were resolved in determining the safe shutdown earthquake for the plant site. Moreover, petitioners' suggestion that the Court applied a three factor "test" for deference to the Commission is incorrect; the Court instead identified three factors that placed the zero-release assumption in context in order to determine whether the Commission's decision was arbitrary and capricious. 462 U.S. at 101. The Court, however, did observe as one of the bases upholding the zero-release assumption that

> a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.

Id. at 103.[5]

Petitioners' contention that the Court of Appeals decision creates an improper standard of review conflicting with Supreme Court and District of Columbia Circuit precedent is without merit and is nothing more than a transparent effort to manufacture a basis for review by this Court. It should not succeed.

---

[5] Petitioners' contention that the Commission is not entitled to deference because the members of the initial licensing board were not trained seismologists or geologists and thus the Nuclear Regulatory Commission lacks the expertise to which such deference customarily is directed borders on the frivolous, as shall be discussed in more detail below. *See* Section II, *infra.*

II.

PETITIONERS' CONTENTION THAT THE COMMISSION IS NOT ENTITLED TO DEFERENCE BECAUSE IT SUPPOSEDLY LACKS THE EXPERTISE TO APPLY ITS OWN REGULATIONS ON POWER PLANT LOCATION IS BOTH UNTIMELY AND WITHOUT MERIT

Petitioners apparently contend that the Court of Appeals erred by deferring to the Commission because the Licensing Board members are not seismologists or geologists and thus the Commission itself is not entitled to the deference customarily given to an administrative agency acting within its areas of expertise. Petition at 5-6, 30, 48. This argument is both untimely and without merit.

A. Petitioners' "Expertise" Argument Is Untimely

This Court ordinarily will not consider questions that were not raised before the administrative agency or courts below. *See, e.g., Adickes* v. *S.H. Kress and Company,* 398 U.S. 144, 147 (1970), *Lawn* v. *United States,* 355 U.S. 339, 362-63 (1958). Petitioners did not challenge the qualifications of the Licensing Board members at any time during the administrative proceedings. Petitioners failed to raise the expertise of the licensing board members as an issue in their opening brief to the Court of Appeals and made only a passing reference to it in their reply brief. Pet. Reply Brief at 27-28. They never argued to the Court of Appeals that the Commission was not entitled to deference because it lacked expertise. Petitioners' "expertise" argument has been raised for the first time in their petition for writ of certiorari; therefore, it is untimely and should not be considered by this Court.

B. The Court of Appeals Properly Deferred To The Expertise Of The Commission

In any event, petitioners' contention that the Commission is not entitled to deference because it lacks expertise borders on the frivolous. This argument reflects a fundamental misunderstanding of the principle of judicial deference to agency ex-

pertise. The deference owed by a reviewing court is to the Commission, not to the initial hearing officers. *See, e.g., Environmental Defense Fund, Inc.* v. *Environmental Protection Agency,* 489 F.2d 1247, 1252-53 (D.C. Cir. 1973) (court deferred to expertise of EPA Administrator, even where the hearing examiner "had no particular expertise in the subject matter"); *Stamper* v. *Secretary of Agriculture,* 722 F.2d 1483, 1486 (9th Cir. 1984) (reviewing court deference is to the agency, not the initial hearing officer whose findings are simply part of the record); *Penasquitos Village, Inc.* v. *National Labor Relations Board,* 565 F.2d 1074, 1076 (9th Cir. 1977) (same). The expertise of the Licensing Board, therefore, does not alter the substantial deference owed to the expertise of the Commission.

Second, petitioners do not and cannot contend that the Commission lacks the expertise to address the seismology and geology questions presented in this case. The Commission is experienced in addressing seismology issues raised in plant location controversies. *See, e.g., North Anna Environmental Coalition* v. *Nuclear Regulatory Commission,* 533 F.2d 655 (D.C. Cir. 1976). The Commission staff has substantial expertise in the seismic questions presented in this case.[6] Moreover, the Commission had the benefit of substantial expert evidence from the United States Geological Survey. *See, e.g.,* Joint Appendix ("J.A.") at 1175 *et. seq.* This staff and extra-agency expertise available to the Commission provides an additional basis for deference to the Commission's decision. *See generally Environmental Defense Fund* v. *Environmental Protection Agency,* 489 F.2d 1247, 1252 (D.C. Cir. 1973); *North Anna Environmental Coalition* v. *Nuclear Regulatory Commission,* 533 F.2d 655, 662 (D.C. Cir. 1976).[7]

---

[6] The Division of Site Safety and Environmental Analysis of the Commission's Office of Nuclear Reactor Regulation, for example, is specifically entrusted to evaluate "site adequacy from the standpoints of geology, seismology" and other sciences. 10 C.F.R. § 1.61(b).

[7] Petitioners presume that the Licensing Board members lacked the technical competence necessary to decide the questions before it, even though two of the three board members possessed scientific and technical backgrounds. Similarly, they offer no evidence that the Licensing Board members were not experienced in addressing nuclear power plant location issues.

The implications of petitioners' contention that a reviewing court must sit in judgment of the qualifications of each agency decisionmaker before determining the appropriate standard of review threaten the delicately balanced and carefully crafted limitations on role of the judiciary in reviewing actions by agencies to which Congress has delegated legislative power to make decisions through administrators appointed by the executive branch. *See generally Weyerhauser Co.* v. *Costle,* 590 F.2d 1011, 1025 (D.C. Cir. 1978) (in reviewing agency rulemaking, court must have due concern "for the 'boundaries between the legislative and the judicial function.' "). Petitioners' argument similarly undermines the theoretical basis of the doctrine of primary jurisdiction; courts need not determine whether individual agency decisionmakers possess sufficient expertise before deciding whether to decline jurisdiction *ab initio* over regulatory matters. *Cf. Nader* v. *Allegheny Airlines,* 426 U.S. 290, 304 (1976).

Petitioners do not and cannot offer any support for the proposition that a court of appeals reviewing agency decisionmaking must first engage in a *de novo* review of the qualifications of individual agency decisionmakers before determining the appropriate standard of review. Petitioners' "expertise" argument is untimely, frivolous, and should not provide a basis for review by this Court.

III.

THE COURT OF APPEALS CORRECTLY PERCEIVED AND APPLIED THE FACTUAL EVIDENCE ON WHICH ITS DECISION IS BASED

Petitioners present an assortment of allegations challenging the factual determinations of the Court of Appeals. In each instance, petitioners claim the Court of Appeals has "misapprehended" petitioners' position. Petition at 48-64. Petitioners do not challenge the record basis or deny that there is a record basis for the Court of Appeals' rulings; they merely argue that they are incorrect. Petitioners also argue that

identical rulings by the Commission should have been considered "danger signals" by the Court of Appeals, *i.e.*, they should have been considered indications that the Commission had not taken a "hard look" at the problems before them. Petition at 37-41. Petitioners disregard the statutory requirement that a finding of fact by an administrative agency must be upheld if it is supported by substantial evidence and is not arbitrary, capricious or an abuse of discretion. 5 U.S.C. 706(2)(A)(E); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 415-17 (1971). The following discussion will attempt to return the issues to their proper context.

A. The Court of Appeals Understood Completely Petitioners' Unfounded Attempt To Litigate The Incapability Of The Cristianitos Fault

Petitioners complain they were prevented from litigating whether the Cristianitos is an incapable fault. They proceed as though there was an unfettered right to raise any issue desired during the course of the hearing. The question of whether the Cristianitos Fault is incapable within the meaning of 10 C.F.R. Part 100, Appendix A, Section III, (g),[8] was not an admitted issue as of the start of hearings. Petitioners had disavowed any interest in the issue in 1977. J.A. at 23-25. In 1981, immediately prior to hearing, petitioners attempted to raise it without articulating any basis. J.A. at 519. Petitioners again attempted to raise the issue during hearing through the testimony of Mr. Richard Simons. The proposed testimony of Mr. Simons was heard and subjected to cross-examination. The

---

[8] 10 C.F.R. Part 100, Appendix A, Section III, (g) provides:

A "capable fault" is a fault which has exhibited one or more of the following characteristics:

(1) Movement at or near the ground surface at least once within the past 35,000 years or movement of a recurring nature within the past 500,000 years.

(2) Macro-seismicity instrumentally determined with records of sufficient precision to demonstrate a direct relationship with the fault.

(3) A structural relationship to a capable fault according to characteristics (1) or (2) of this paragraph such that movement on one could be normally expected to be accompanied by movement on the other.

Licensing Board rejected the evidence as lacking in probative value. The Court of Appeals found the Licensing Board's exclusion of the evidence to have been proper and cited petitioner's failure to make any further offer of proof. Opinion at 16.

There is no "misapprehension." Petitioners failed to raise the issue in a timely manner, could not offer probative evidence on the issue when given the opportunity and made no further offer of proof. The Court of Appeals ruling is correct.

B. Petitioners' Proposed Interpretation Of The Offshore Zone Of Deformation As A Stipulated Continuous Fault Is A Flagrant Misinterpretation Of The Facts

Petitioners complain that the Court of Appeals has incorrectly accepted the Licensing Board's characterization of the controlling geologic feature for the San Onofre site, the Offshore Zone of Deformation ("OZD"), as a segmented zone of faults and folds rather than a continuous throughgoing fault. They contend that intervenors had stipulated that the OZD is a contiguous, throughgoing fault. Petitioners' argument is a distortion of the record. As early as 1973, the Licensing Board in the construction permit proceeding stated "an honest difference of opinion exists between the experts on the two sides as to the proper geological model to use," and that "there may even be a small preponderance of the evidence" in favor of the applicants' interpretation of the geological data. 6 AEC 929, 943; J.A. at 454.

Intervenors consistently have maintained that the old USGS model did not accurately describe the OZD. Tr. 313, 317, 1043-1055, J.A. at 4, 5, 25-37; "Applicants' Response to Revised Contentions of Intervernors FOE, *et al.*, submitted May 5, 1981" dated May 12, 1981, J.A. at 1286. At most, intervenors agreed that the three segments of the OZD would be treated as a 240 kilometer-long linear zone of deformation for purposes of calculating the potential magnitude of an earthquake along the OZD. Tr. 1047, J.A. at 29.

Petitioners attempt to rely on a *portion* of the USGS testimony cited by the Court of Appeals. Petitioners, however, have omitted the lead sentence of the excerpt quoted by the court:

> "[The USGS model] specifically avoided the term 'fault zone.' We called it a zone of deformation because there are indeed segments which are not faulted, but instead deformed, folded, for example."

Opinion at 17. The clinching testimony of USGS representative Mr. Devine relied upon by the Court of Appeals was:

> "No. As I recall, *none of us had the opinion or the position that the entire length could rupture at once,* but only that there was indeed some relationship, probably at depth, of these three segments such that it all should be considered one zone."

Opinion at 18. The Court of Appeals did not misapprehend the facts.

C. Petitioners' Construction Of Dr. Slemmons Testimony Is Again Without Merit

Petitioners continue to propose interpretations of the facts that are not sustained by a fair reading of the record. With respect to Commission witness Dr. Slemmons, petitioners continue to assert an interpretation of his testimony rejected by the witness and every decision in this proceeding. Petitioners now fault the Court of Appeals on the ground petitioners find a transcript reference subsequent to that cited by the Court of Appeals as a basis for its determination. Petition at 56.

Petitioners ignore the Court of Appeals finding that the conclusion arrived at by Dr. Slemmons is supported by other competent evidence:

> More fundamentally, however, [petitioners] ignore the Appeal Board's express finding that even excluding the testimony assailed by petitioners, "[t]he choice of a Ms 7.0 safe shutdown earthquake for San Onofre is amply supported by *other expert testimony* in the record," particularly the testimony of Drs. Smith and Ehlig. Appeal Board Decision at 709 n.40, J.A. at 631. [emphasis added].

Opinion at 19. This Court cannot ignore the substantial evidence in support of the Court of Appeals determination. Petitioners' allegations are not a proper subject for review by this Court.

D. The Court Of Appeals Correctly Reviewed The "Conservatism" Of The Commissions' Findings

Petitioners complain that the Court of Appeals "misapprehended" the issue of whether the Commission's determination of the safe-shutdown earthquake was done in a "conservative manner" as required by 10 C.F.R. Part 100, App. A § V(a)(1)(iv). Petition at 58. Petitioners do not complain that the Commission was arbitrary or capricious, or that its determination is not backed by substantial evidence. Their complaint is that neither the Commission nor the Court of Appeals followed the test of conservatism proposed by petitioners.

> The Court of Appeals correctly cited the Commission's statutory mandate to "provide adequate protection to the health and safety of the public" as requiring not a risk-free environment, but a "reasonable assurance . . . that the reactor would be safely operated at the proposed location." [citations omitted]. . . . After examining the record, both the evidence for and against the Commission's findings, we find those findings amply supported by substantial evidence.

Opinion at 22. Petitioners refuse to accept that the Court of Appeals specifically rejected their proposed tests calling for a quantification of risks. The Court of Appeals addressed petitioners' complaint and found that the Commission had acted in a "conservative" manner in making the numerous judgments necessary to arrive at its ultimate conclusion. The Court of Appeals did not "miss the point." To the contrary, it dealt specifically with petitioners' argument and rejected it specifically. Opinion at 24-25.

E. Petitioners' Interpretation Of 10 C.F.R. § 2.752 Remains Frivolous

Petitioners complain that the Court of Appeals characterized their argument relative to the proper interpretation 10 C.F.R. § 2.752(a) as "patently frivolous." Petition at 61-64.

That section states:

> A prehearing conference held under this section in a proceeding involving a construction permit or operating license shall be held within 60 days after discovery has been completed or such other time as the Commission or the presiding officer may specify.

Petitioner's argument is that the *intent* of the provision is to require a special prehearing conference only after discovery is complete. According to petitioners, the plain language allowing the Commission or presiding officer to set a conference at some other time is to be read out of the regulation. As stated by the Court of Appeals, the contention is "patently frivolous." Opinion at 26.

F. The Commission's Regulations Do Not Require Litigation Of The Capability Of The Cristianitos Fault

Petitioners allege that the Court of Appeals and the Commission were required to litigate the incapability of the Cristianitos Fault because it lies within 200 miles of the site and because it has allegedly experienced movement within the last 35,000 years and recurring movement within the last 500,000 years. Petition at 37. It is notable that petitioners do not cite the record for their statement that the Cristianitos Fault has moved within the last 35,000 years or experienced recurring movement in the last 500,000 years. The reason for the missing citation is that no such evidence was developed or tendered. Petitioners' allegation again is baseless.

Petitioners argument is based on a premise that because the Commission must review all faults within 200 miles of the site, it also is necessary to litigate their incapability. Petition at 37. It is not necessary to litigate every item reviewed by the

Commission in licensing a nuclear facility. As petitioners know well, a hearing on an operating license application is not even required unless requested by an interested party. Atomic Energy Act, 42 U.S.C. § 2239(a). Further, in order to litigate an issue in an operating license proceeding, it must be specifically raised and a basis for the issue articulated. 10 C.F.R. § 2.714(b). Petitioners have not been able to meet this standard. *See, supra,* at 17-18. Petitioners' attempt to raise a Commission *review* item to the level of a required issue for litigation must fail.

G. Petitioners' Statement Of Facts Is Replete With Arguments Previously Denied By The Court Of Appeals

Petitioners set forth what they characterize as "Statement of Facts Upon Which Error at the Administrative Level is Based." Petition at 18-28. Petitioners ask that this statement be read in the context of a party that has been severely prejudiced by an unfair administrative tribunal. Petition at 18. The section is not a statement of fact but, rather, a restatement of arguments previously addressed and denied by the Court of Appeals. Many of petitioners' allegations have been addressed in Section III A-F, *supra.* The following addresses the allegations not previously discussed.

1. Intervenors Had Ample Time To Prepare Their Case.

The Court of Appeals decision accurately reflects the true timetable leading to hearing. Opinion at 25-27. Petitioners intervened in the proceeding in 1977 and had until mid-1981 (more than three years) available for discovery. That the pace of preparation increased immediately prior to hearing is not a ground for appeal. The Court of Appeals correctly found no unfairness with respect to schedule or legal representation.

2. Admission Of The FSAR Was Not Reversible Error.

Petitioners recite an evidentiary issue on which they did not prevail, *i.e.,* whether the Final Safety Analysis Report should have been admitted to evidence. The Court of Appeals correctly determined that because neither intervenors nor the Licensing Board relied on its contents, the error, if any, was harmless. Opinion at 22-24.

3. The Commission Accorded Proper Weight To The Testimony Of Drs. Luco And Boore.

Petitioners state that the Licensing Board "ignored and totally misconstrued" the testimony of Drs. Luco and Boore. Petition at 26. Petitioners again present no more than a simple disagreement over how the trier of fact viewed the evidence. Moreover, the Court of Appeals disposed of that purported issue in a reasoned manner based on substantial evidence.

Petitioners' listing of the issues and arguments they previously have lost is irrelevant. The arguments were individually without merit and cumulation does not add validity. Petitioners do not present any issues worthy of this Court's review.

CONCLUSION

For the foregoing reasons, intervenors request that the petition for a writ of certiorari be denied.

Respectfully submitted,

DAVID R. PIGOTT
(Counsel of Record)
SAMUEL B. CASEY
RONALD G. ARONOVSKY
CATHERINE M. KELLY

ORRICK, HERRINGTON & SUTCLIFFE
600 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94111
TELEPHONE: (415) 392-1122
Attorneys for Intervenors
Southern California
Edison Company,
San Diego Gas
& Electric Company,
the City of Anaheim,
California and the
City of Riverside, California

CHARLES R. KOCHER
JAMES A. BEOLETTO

SOUTHERN CALIFORNIA
EDISON COMPANY
2244 Walnut Grove Avenue
Rosemead, California 91770
Telephone: (818) 302-1212
Attorneys for Intervenor
Southern California
Edison Company

May 10, 1985